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## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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No. 397

THE UNITED STATES OF AMERICA, APPELLANT

VS.

THE BORDEN COMPANY, CHARLES L. DRESSER, HARRY  
M. RESER, ET AL

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS

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FILED SEPTEMBER 18, 1939

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1 [Caption omitted.]

3 In United States District Court for the Northern District of  
Illinois, Eastern Division

Of the October Term, in the Year 1938

*Indictment*

Filed Nov. 1, 1938

The grand jurors of the United States of America, empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern District of Illinois, at the July Term of said Court, in the year 1938, having begun but not finished during said July Term of Court, among other things, an investigation of the matters charged in this indictment; and having continued to sit by order of this Court in and for said Division and District during the September and October Terms of said Court for the purpose of finishing investigations begun but not finished during said July Term of said Court; and inquiring within and for said Division and District at the October Term of said Court, in the year 1938, do upon their oaths find and present as follows, to wit:

COUNT ONE

I. PERIOD OF TIME COVERED BY THE INDICTMENT

1. Each of the allegations hereinafter contained in this indictment shall be deemed to refer to the period beginning in the month of January 1935, and continuing thereafter up to and including the date of the presentment of this indictment, unless otherwise expressly stated.

2. Each allegation hereinafter made in this indictment that an act has been done by any of the defendants herein, or by any other person, shall be deemed to be an allegation that such act was performed within three years next preceding the date of the presentment of this indictment, unless otherwise expressly stated.

II. DEFINITIONS

Whenever the following words are used in this indictment, they shall be deemed to have the meanings set forth below:

3. Fluid Milk.—Fluid milk is cow's milk produced for sale and consumption in fluid form as whole milk.

4. Approved Dairy Farm.—An approved dairy farm is a farm approved by the Board of Health of the City of Chicago for the production of fluid milk for shipment into the City of Chicago.

5. **Producer.**—A producer is any person, firm, or corporation owning or possessing one or more cows and selling in the form of fluid milk a part or all of the milk produced by such cows.

6. **Member-Producer.**—A member-producer is a producer belonging to the Pure Milk Association, an association more fully described in paragraphs 34 and 35 of this indictment.

7. **Independent Producer.**—An independent producer is a producer not belonging to the Pure Milk Association.

8. **Handling.**—Handling is pasteurizing and bottling fluid milk.

9. **Distributor.**—A distributor is a person, firm, or corporation engaged in the business of receiving, handling, distributing, and selling fluid milk, in whole or in part, in the City of Chicago.

10. **Major Distributor.**—A major distributor is any one of the distributors named in paragraph 25 of this indictment.

11. **Independent Distributor.**—An independent distributor is any distributor not a major distributor.

12. **Association Member.**—An association member is any distributor who is a member of Associated Milk Dealers, Inc., a corporation more fully described in paragraphs 30 to 32 of this indictment.

13. **Non Association Member.**—A non association member is any distributor not a member of Associated Milk Dealers, Inc.

14. **Country Station.**—A country station is any place, premise, or establishment located outside the City of Chicago where milk is collected preparatory to shipment to the City of Chicago.

15. **Milk Plant.**—A milk plant is any place, premise, or establishment in the City of Chicago where milk is collected, handled, or otherwise prepared for distribution and sale.

### III. NATURE OF THE TRADE AND COMMERCE INVOLVED

16. The City of Chicago, Illinois, has a population in excess of three and one-half million people and is a large market for the distribution and sale of fluid milk. In excess of a million quarts of fluid milk are distributed and sold each day in the City of Chicago.

17. There have been and there are in the States of Illinois, Indiana, Michigan, and Wisconsin more than fifteen thousand approved dairy farms, of which approved dairy farms more than 50% are located in the states other than the State of Illinois. There are many unapproved dairy farms which are located within the same area as that wherein approved dairy farms are located.

18. The production of milk destined for ultimate distribution and sale as fluid milk in the City of Chicago, its transportation to the said City, its preparation for distribution and sale within the said City, and its distribution and sale within the said City, have been and are regulated by an ordinance of the said City and by rules and regulations promulgated and adopted by the Board of Health of the City of Chicago.

19. Fluid milk by its nature is perishable; it cannot be stored and it must reach the consumer within a short time after its production.

The ordinance of the City of Chicago and the rules and regulations adopted by the Board of Health of the said City require that all milk produced for sale as fluid milk in the said City must be delivered daily to a place, premise, or establishment where milk is collected preparatory to pasteurization elsewhere, or to a pasteurization plant where milk is handled and otherwise prepared for distribution and sale as fluid milk. The said ordinance and the said rules and regulations also require that pasteurized fluid milk sold in the said City must be sold not later than noon of the day beginning twenty-five hours after the date of pasteurization, and that certified fluid milk sold in the said City must be sold not later than the day beginning thirty hours after the time the said milk is drawn from the cow.

20. There have been and there are more than one hundred twenty-five distributors who purchase fluid milk from producers for distribution and sale in the City of Chicago.

21. Fluid milk produced on the said approved dairy farms is transported to the City of Chicago in two ways: In some instances the said fluid milk is transported from approved dairy farms to country stations located nearby, where the said fluid milk is commingled and combined with fluid milk from other approved dairy farms, and thereafter transported from the said country stations to the City of Chicago by means of over-the-road motor vehicles and by railroad. In other instances, said fluid milk is transported directly to the City of Chicago from approved dairy farms by over-the-road motor vehicles.

22. Of the fluid milk produced on approved dairy farms situated in the States of Illinois, Indiana, Michigan, and Wisconsin, approximately forty percent has been and is produced on approved farms located in the States of Indiana, Michigan, and Wisconsin. The said fluid milk so produced on approved dairy farms in the States of Indiana, Michigan, and Wisconsin has been and is transported and shipped daily in interstate commerce by over-the-road motor vehicles and by railroad into the City of Chicago in the State of Illinois.

23. The fluid milk produced on the approved dairy farms in the States of Indiana, Michigan, and Wisconsin, and so transported and shipped in interstate commerce into the City of Chicago, is combined and commingled soon after it leaves the said approved dairy farms and while it is in the current of interstate commerce, with fluid milk produced in the State of Illinois. The fluid milk produced in the State of Illinois, and distributed and sold in the City of Chicago, is produced, and is purchased by distributors with a view to, and for the purpose of, being added to an existing current of interstate commerce.

24. The production of the said fluid milk in the States of Illinois, Indiana, Michigan, and Wisconsin, its transportation into the said City of Chicago, and its distribution and sale in the said City, has constituted and does constitute trade and commerce in fluid milk among the several states of the United States within the meaning of



the Act of Congress approved July 2, 1890, entitled, "An Act To protect trade and commerce against unlawful restraints and monopolies."

#### IV. THE DEFENDANTS

25. The grand jurors aforesaid, upon their oaths aforesaid, do further present that the following-named corporations are hereby indicted and made defendants herein. (The said defendants are hereinafter collectively referred to as "major distributors.") Each of the major distributors, during the period of time covered by this indictment, has been and is a corporation duly authorized to do business under and by virtue of the laws of the state of incorporation as indicated below; has had its principal place of business as indicated below; and has engaged in the business of distributing and selling fluid milk in the City of Chicago:

Name of corporation	State of Incorporation	Date of incorporation	Principal place of business
The Borden Company	New Jersey	1899	350 Madison Avenue, New York, New York. (Chicago Office: 3638 North Broadway.)
Borden-Wieland, Inc.	Delaware	1934	350 Madison Avenue, New York, New York. (Chicago Office: 3638 North Broadway.)
Bowman Dairy Company	Illinois	1891	140 West Ontario Street, Chicago, Illinois.
Sidney Wanzer & Sons, Inc.	Illinois	1922	124 West Garfield Boulevard, Chicago, Illinois.
Hunting Dairy Company	Illinois	1912	6949 Stony Island Avenue, Chicago, Illinois.
Capitol Dairy Company	Illinois	1920	4325 South Wabash Avenue, Chicago, Illinois.
Western-United Dairy Company	Illinois	1936	1451 Grenshaw Street, Chicago, Illinois.
Western Dairy Company, Inc.	Illinois	1908	1451 Grenshaw Street, Chicago, Illinois.
United Dairy Company	Illinois	1911	1451 Grenshaw Street, Chicago, Illinois.
International Dairy Company	Illinois	1912	1919 South Ashland Avenue, Chicago, Illinois.

26. The defendant Western-United Dairy Company was incorporated on December 28, 1936, for the purpose of reorganizing and consolidating the business of the defendant Western Dairy Company, Inc., and the business of the defendant United Dairy Company. Since December 28, 1936, the defendants Western-United Dairy Company, Western Dairy Company, Inc., and United Dairy Company have been affiliated corporations and have been under common control and management.

27. The said major distributors sell approximately sixty-five per cent of the fluid milk sold in the City of Chicago.

28. Each of the defendant major distributors purchases fluid milk which is produced in states outside of Illinois and transported to the City of Chicago. Each of the defendant major distributors commingles the fluid milk received from states outside the State of Illinois with milk produced within the State of Illinois, and then sells the commingled milk in the City of Chicago as one product. All of the defendant major distributors maintain country stations



in states outside of the State of Illinois, receive fluid milk at the said country stations, and transport the said milk, or cause it to be transported, in interstate commerce to the City of Chicago. The following major distributors maintain country stations in the following states:

Major distributor:	State
The Borden Company	Indiana:
Borden-Wieland, Inc.	Wisconsin.
Bowman Dairy Company	Indiana.
Sidney Wanzer & Sons, Inc.	Wisconsin.
Hunding Dairy Company	Indiana.
Capitol Dairy Company	Indiana.
Western-United Dairy Company	Indiana.
Western Dairy Company, Inc.	Wisconsin.
United Dairy Company	Wisconsin.
International Dairy Company	Indiana.

29. The individuals whose names and addresses are set forth below are hereby indicted and made defendants herein. Each of the said individuals now is associated with or employed by the defendant corporation and holds the official title or position as shown below, or has been so associated or employed or has so held an official title or position during the period covered by this indictment and within three years prior to the date of the presentment of this indictment. Said individual defendants, during the period covered by this indictment, and within three years prior to the date of its presentment, have been actively engaged in the management, direction, and control of the affairs, policies, and acts of the respective defendant corporations, and particularly those affairs, policies, and acts of said corporation described in this indictment, and have authorized, ordered, and done the acts of said corporations constituting the offenses hereinafter charged in this indictment:

Name of individual	Address	Official title or position	Defendant corporation with which connected
D. B. Peck	Chicago, Ill.	President	Bowman Dairy Company.
Francis H. Kullman, Jr.	Chicago, Ill.	Vice-President	Bowman Dairy Company.
M. J. Metzger	Chicago, Ill.	Vice-President	Bowman Dairy Company.
H. T. Adamson	Chicago, Ill.	Treasurer	Bowman Dairy Company.
J. F. Philippi	Chicago, Ill.	Vice-President	Bowman Dairy Company.
H. W. Comfort	New York, N. Y.	Vice-President, The Borden Company, in Charge of Fluid Milk Operations.	The Borden Company. Borden-Wieland, Inc.
S. M. Ross	Columbus, Ohio.	District Chairman, Midwest District of the Borden Company.	The Borden Company. Borden-Wieland, Inc.
Charles L. Dressel	Chicago, Ill.	President, Borden-Wieland Division of the Borden Company.	The Borden Company. Borden-Wieland, Inc.
Harry M. Reser	Chicago, Ill.	Vice-President, Borden-Wieland Division of The Borden Company.	The Borden Company. Borden-Wieland, Inc.
W. A. Baril	Chicago, Ill.	Vice-President, Borden-Wieland Division of The Borden Company.	The Borden Company. Borden-Wieland, Inc.
O. O. Smaha	Chicago, Ill.	Asst. Treasurer, Borden-Wieland Division of The Borden Company.	The Borden Company. Borden-Wieland, Inc.
R. W. Nessler	Chicago, Ill.	Asst. Secretary, Borden-Wieland Division of The Borden Company.	The Borden Company. Borden-Wieland, Inc.

Name of individual	Address	Official title or position	Defendant corporation with which connected
F. A. Webb	Chicago, Ill.	Director, Bureau of Safety, Borden-Wieland Division of The Borden Company.	The Borden Company. Borden-Wieland, Inc.
Gordon B. Wanzer	Chicago, Ill.	Vice-President.	Sidney Wanzer & Sons, Inc.
H. Stanley Wanzer	Chicago, Ill.	Vice-President.	Sidney Wanzer & Sons, Inc.
Carl W. Hunding	Chicago, Ill.	Vice-President.	Hunding Dairy Company.
Hyman I. Freed	Chicago, Ill.	President.	Capitol Dairy Company.
Louis G. Glick	Chicago, Ill.	Chairman of the Board, Western-United Dairy Company.	Western-United Dairy Co. United Dairy Company. Western Dairy Company, Inc.
Maurice S. Dick	Chicago, Ill.	President, Western-United Dairy Company.	Western-United Dairy Co. Western Dairy Co., Inc. United Dairy Co.
Samuel S. Dick	Chicago, Ill.	Treasurer, Western-United Dairy Company.	Western-United Dairy Co. Western Dairy Co., Inc.
Louis Janata	Chicago, Ill.	Secretary.	United Dairy Co. International Dairy Co.

30. The Associated Milk Dealers, Inc., has its principal place of business at 309 West Jackson Boulevard, Chicago, Illinois, and is a trade association organized as a corporation on January 14, 1935, under and by virtue of the laws of the State of Illinois, and during the period covered by this indictment, it has been duly authorized to do business under and by virtue of the laws of the State of Illinois. The said corporation is hereby indicted and made a defendant herein. Substantially all of the members of Associated Milk Dealers, Inc., are distributors doing business in the City of Chicago.

31. The income of Associated Milk Dealers, Inc., is derived from dues and assessments levied against its members on the basis of the number of routes which each member operates. During the period covered by this indictment and within the three years prior to the date of its presentment, all of the major distributors have been members of Associated Milk Dealers, Inc., and throughout the said period of time have contributed in excess of seventy-five per cent of the total annual income of the said Associated Milk Dealers, Inc.

32. During the period covered by this indictment and within the three years prior to the date of its presentment, the said defendant major distributors have dominated and controlled the business and activities of the said Associated Milk Dealers, Inc. The said domination and control has been exerted and maintained by means of, among others, the activities of individual defendants who were officers or representatives of the major distributors and who were also officers and directors of the said Associated Milk Dealers, Inc. During all or part of the said period of time, the following defendants, representing the defendant major distributors indicated below, have held the official title or position with the defendant Associated Milk Dealers, Inc., indicated below:

# UNITED STATES VS. THE BORDEN COMPANY ET AL

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Name of individual	Official title or position with Associated Milk Dealers, Inc.	Defendant major distributor with which connected
W. A. Baril	Vice-President and Director	The Borden Company.
D. B. Peck	Vice-President and Director	Borden-Wieland, Inc.
H. Stanley Wanzer	Vice-President and Director	Bowman Dairy Company.
Carl W. Hundling	Director	Sidney Wanzer & Sons, Inc.
Hyman I. Freed	Chairman of the Committee on Fair Trade Practices, and Director.	Hundling Dairy Company.
Louis G. Glick	Vice-President	Capital Dairy Company.
Maurice S. Dick	Director	United Dairy Company.
Louis Janata	President and Vice-President	Western United Dairy Company.
		Western Dairy Company, Inc.
		United Dairy Company.
		Western-United Dairy Company.
		Western Dairy Company, Inc.
		International Dairy Company.

33. The individuals whose names and addresses are set forth below are hereby indicted and made defendants herein. Each of the said individuals is associated with the defendant Associated Milk Dealers, Inc., and holds the official title and position shown below, and has been so associated and has so held the said official title and position during the period covered by this indictment and within three years prior to the date of the presentment of this indictment. The said individual defendants have, during the period covered by this indictment, been actively engaged in the management, direction, and control of the affairs, policies, and acts of the defendant Associated Milk Dealers, Inc., particularly those affairs, policies, and acts of said defendant Associated Milk Dealers, Inc., described in this indictment, and have authorized, ordered, and done the acts of said corporation constituting the offenses hereinafter charged in this indictment:

Name of individual	Address	Official title or position with Associated Milk Dealers, Inc.
Paul Potter	Chicago, Ill.	Executive Secretary.
Otto Black	Chicago, Ill.	Field Representative.
W. A. Baril	Chicago, Ill.	Vice-President and Director.
D. B. Peck	Chicago, Ill.	Vice-President and Director.
H. Stanley Wanzer	Chicago, Ill.	Vice-President and Director.
Carl W. Hundling	Chicago, Ill.	Director.
Hyman I. Freed	Chicago, Ill.	Chairman of the Committee on Fair Trade Practices, and Director.
Louis G. Glick	Chicago, Ill.	Vice-President.
Maurice S. Dick	Chicago, Ill.	Director.
Louis Janata	Chicago, Ill.	President and Vice-President.

34. The Pure Milk Association has its principal place of business at 608 South Dearborn Street, Chicago, Illinois, and was organized and incorporated on January 11, 1926, under an act of the General Assembly of the State of Illinois, entitled "The Cooperative Marketing Act," approved June 21, 1923. Since the date of its incorporation and during the period covered by this indictment, the defendant Pure Milk Association has been duly authorized to do business under and by virtue of said Act. The said Pure Milk Association is hereby indicted and made a defendant herein. The Pure Milk Association, during the period covered by this indictment, has had a membership in excess of twelve thousand producers. Throughout the period cov-

ered by this indictment, approximately fifty per cent of all the members of the Pure Milk Association have been located outside of the State of Illinois.

35. Each member of the Pure Milk Association sells fluid milk pursuant to a membership agreement entered into with the Pure Milk Association, by the terms of which the Pure Milk Association is constituted sole and exclusive agent for the purpose of marketing the said milk. In excess of eighty per cent of all the milk produced by the members of the Pure Milk Association has been and is produced on approved dairy farms. Approximately seventy-five per cent of the said fluid milk so produced on approved dairy farms by members of defendant Pure Milk Association has been and is purchased by the major distributors.

36. The individuals whose names and addresses are set forth below are hereby indicted and made defendants herein. Each of the said individuals is associated with or employed by the defendant Pure Milk Association and holds the official title or position shown below or has been so associated or employed or has so held the said official title or position during the period covered by this indictment and within three years prior to the date of its presentment. Said individual defendants have, during the period covered by this indictment, been actively engaged in the management, direction, and control of the affairs, policies, and acts of the defendant Pure Milk Association, and particularly those affairs, policies, and acts of said defendant Pure Milk Association described in this indictment, and have authorized, ordered, and done the acts of said corporations constituting the offenses hereinafter charged in this indictment:

Name of individual	Address	Official title or position with Pure Milk Association
Don N. Geyer	c/o H. P. Hood & Sons, Boston, Mass.	Secretary and General Manager.
Edward F. Cooke	Elmhurst, Ill.	Director of Public Relations.
E. E. Houghtby	Shabbona, Ill.	Director and Treasurer.
F. J. Knox	Waukegan, Ill.	Officer of Marketing Department.
Lowell D. Oranger	Maple Park, Ill.	Manager of Fluid Sales Department.
John P. Case	Naperville, Ill.	President and General Manager.

37. The Milk Dealers Bottle Exchange (sometimes hereinafter referred to as the Bottle Exchange) has its principal place of business at 2355 Blue Island Avenue, Chicago, Illinois; and is a corporation organized on December 24, 1918, under and by virtue of the laws of the State of Illinois. The said Milk Dealers Bottle Exchange is hereby indicted and made a defendant herein. The Bottle Exchange was duly authorized to do business during the period covered by this indictment under and by virtue of the laws of the State of Illinois, and during said period was engaged within the city of Chicago in the business of collecting, exchanging, and distributing milk bottles, cans, and other containers used by distributors. Large special discounts are allowed to the stockholders of the Bottle Exchange,



but are not allowed to nonstockholders, on charges for services rendered.

38. Throughout the period covered by this indictment, the defendant major distributors together have owned in excess of eighty per cent of the total outstanding stock of the defendant Milk Dealers Bottle Exchange and have completely dominated and controlled the activities and business of said Milk Dealers Bottle Exchange. The said domination and control has been exerted and maintained by means of, among others, officers and representatives of said defendant major distributors, who are also officers and directors of the Bottle Exchange. The following individuals, representing the defendant major distributors, have held or now hold the official title or position with the defendant Milk Dealers Bottle Exchange indicated below:

Name of individual	Official title or position with Milk Dealers Bottle Exchange	Defendant major distributor with which connected
R. W. Newler	President and Director	The Borden Company. Borden-Wieland, Inc.
F. A. Webb	Secretary and Director	The Borden Company. Borden-Wieland, Inc.
Francis H. Kullman, Jr.	Vice-President and Director	Bowman Dairy Company.
Sidney Wanzer, III	Assistant Secretary	Sidney Wanzer & Sons, Inc.
H. Stanley Wanzer	Director	Sidney Wanzer & Sons, Inc.
B. M. Hundling	Director	Hundling Dairy Company.
Maurice S. Dick	Director	Western-United Dairy Co. Western Dairy Company, Inc. United Dairy Company.

39. The Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, an affiliate of the American Federation of Labor, of 220 South Ashland Boulevard, Chicago, Illinois (hereinafter referred to as Local 753), is a voluntary unincorporated association of individuals and has continuously existed as such throughout the period of time covered by this indictment. The said Local 753 is hereby indicted and made a defendant. The individual members of Local 753 are employed by distributors in the City of Chicago in connection with the distribution and sale of fluid milk in the said City. Local 753, throughout the period covered by this indictment, has had a membership in excess of five thousand members. At all times throughout the period covered by this indictment, approximately seventy-five per cent of all the employed members of Local 753 have been employed by the major distributors.

40. The individuals whose names and addresses are set forth below are hereby indicted and made defendants herein. Each of the said individuals is now associated with Local 753 and now holds the official title or position shown below; and has been so associated, and has so held the said official title or position throughout the period covered by this indictment and within three years prior to the date of its presentment. The said individual defendants, during the period covered by this indictment, have been actively engaged in the management, direction, and control of the affairs, policies, and acts of



Local 753, particularly those affairs, policies and acts described in this indictment, and have authorized, ordered and done the acts of Local 753 constituting the offenses hereinafter charged in this indictment:

Name of individual	Address	Official title or position with Milk Wagon Drivers' Union
Robert G. Fitchie.....	Chicago, Ill.....	President.
James Kennedy.....	Chicago, Ill.....	Vice-President.
Steve Sumner.....	Chicago, Ill.....	Secretary-Treasurer.
Fred C. Dahms.....	Chicago, Ill.....	Recording Secretary.
F. Ray Bryant.....	Chicago, Ill.....	Trustee.
John O'Connor.....	Chicago, Ill.....	Business Agent.
David A. Riskind.....	Chicago, Ill.....	Attorney.

41. Leslie G. Goudie has been, throughout the period covered by this indictment, and now is, president of the Joint Council No. 25 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, an affiliate of the American Federation of Labor, and is hereby indicted and made a defendant herein. The Joint Council is an advisory body to the forty-seven local unions comprising all of the teamsters' and chauffeurs' unions in the City of Chicago, including Local 753, and is composed of the officers of each local union.

42. Daniel A. Gilbert, of Chicago, Illinois, a police officer of the City of Chicago, assigned to the office of the State's Attorney of Cook County, Illinois, as chief investigator, is hereby indicted and made a defendant herein.

43. Herman N. Bundesen, of Chicago, Illinois, a member of and president of the Board of Health of the City of Chicago, is hereby indicted and made a defendant herein. Paul Krueger, of Chicago, Illinois, chief sanitary officer in charge of the dairy section of the Board of Health of the City of Chicago, and William J. Guerin, chief of city dairy inspection of the Board of Health of the City of Chicago are hereby indicted and made defendants herein.

44. The following individuals, who acted as arbitrators in arbitration proceedings hereinafter described, are hereby indicted and made defendants herein:

Leland Spencer, of Ithaca, New York.

W. A. Wentworth, of New York, New York.

45. Whenever it is hereinafter alleged that any defendant corporation or defendant association did do or perform any act or thing the said allegation shall be deemed to mean that each of the said persons named herein as defendants and described as officers or agents of, or as being or having been employed by or associated with, the said defendant corporation or defendant association, did authorize, order, direct, participate in and cause the doing or performing of such act or thing.

46. Whenever the Christian or given names of any of the defendants herein are unknown to the grand jurors, said Christian or given names are indicated by initial letters.

## V. THE COMBINATION AND CONSPIRACY

47. The grand jurors aforesaid, on their oaths aforesaid, do further present that beginning in the month of January 1935, and continuously thereafter up to and including the date of the presentment of this indictment, all of the defendants named herein, and other persons to the grand jurors unknown, well knowing all of the facts heretofore alleged in this indictment, unlawfully have combined and conspired together and engaged with one another to arbitrarily fix, maintain, and control artificial and noncompetitive prices to be paid to all producers by all distributors for all fluid milk produced on approved dairy farms located in the States of Illinois, Indiana, Michigan, and Wisconsin, and including all fluid milk so produced and shipped from the States of Illinois, Indiana, Michigan, and Wisconsin into the said City of Chicago, as hereinbefore described. In so doing, the defendants have then and there engaged in an unlawful combination and conspiracy, in restraint of trade and commerce in said fluid milk among the said several states of the United States, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies."

48. Said unlawful combination and conspiracy was intended to be effected, and has been effected, by divers means and methods including, among others, the following, that is to say:

49. Beginning in the month of January 1935, and thereafter at different times throughout the period of time covered by this indictment, the major distributors, the Pure Milk Association, and the Associated Milk Dealers, Inc., acting by, through and under the direction of, their respective officers, agents, and employees hereinbefore made defendants, and by and through others of their officers and agents and other persons to the grand jurors unknown, did, pursuant to a concerted plan and agreement, meet jointly at divers times and places in the City of Chicago, and did then and there fix, determine, and agree upon uniform terms and conditions for the purchase of all fluid milk purchased through the Pure Milk Association. The said uniform terms and conditions included, among others, the following (which are hereinafter referred to as "price provisions"):

- (i) Provision as to prices.
- (ii) Provision as to the basis for computing price.
- (iii) Provision as to the classification of milk for the purpose of pricing.
- (iv) Provision as to the quantity of milk to be purchased through Pure Milk Association.
- (v) Provision as to the time and place of delivery.
- (vi) Provision as to the time and terms of payment.

In fixing and agreeing upon the said price provisions, the said defendants intended that all fluid milk sold by Pure Milk Association to all independent distributors should be sold pursuant to and in accordance with the said price provisions. Said defendants further intended that all distributors of fluid milk in the City of Chicago should purchase fluid milk from independent producers in accordance with said price provisions.

50. Beginning in the month of March 1935, and thereafter at different times throughout the period covered by this indictment, each of the major distributors, acting in concert with all of the other major distributors, and pursuant to and in execution of the combination and conspiracy hereinbefore described, entered into individual agreements with the Pure Milk Association to purchase substantially all of its requirements of fluid milk from the Pure Milk Association. Each of the said agreements contained all of the price provisions determined and agreed upon by the defendants as described in paragraph 49 of this indictment. The said agreements provided, among other things, that if the Pure Milk Association sold or caused to be sold fluid milk to any distributor for a lower price than that provided for by the said price provisions, the major distributors would be entitled to purchase milk through the Pure Milk Association for the said lower price.

51. Beginning in the month of March 1935, and thereafter throughout the period covered by this indictment, each of the major distributors, acting in concert with all of the other major distributors, and pursuant to and in execution of the said combination and conspiracy, did purchase substantially all of its requirements of fluid milk from the Pure Milk Association pursuant to and in accordance with the price provisions. Throughout the said period of time, all fluid milk sold to all distributors by the Pure Milk Association in the City of Chicago, or for distribution therein, was sold pursuant to and in accordance with price provisions identical with those prescribed in the said agreements with the major distributors, and the Pure Milk Association refused to sell fluid milk to any distributor in the City of Chicago except pursuant to and in accordance with the price provisions contained in such written agreements and for prices fixed pursuant to such price provisions.

52. All fluid milk purchased by the major distributors from independent producers was purchased at prices based upon the price provisions contained in said agreements, and the major distributors refused to purchase any fluid milk from any independent producer except at prices based upon the price provisions fixed and determined as aforesaid.

53. The Pure Milk Association, during the period covered by this indictment, published and sent to all distributors purchasing fluid milk from or through said Association, monthly price letters quoting the prices to be paid to its members by distributors for fluid milk purchased by them, which said prices were computed in accordance with the artificial and noncompetitive price provisions fixed and determined as aforesaid. The Pure Milk Association also published and

sent a monthly periodical entitled "Pure Milk" to its member producers and others, and set forth in the said periodical the said artificial and noncompetitive prices, well knowing and intending that said artificial and noncompetitive prices would be relied upon and accepted by independent distributors and by them made the basis of prices to be paid by them to independent producers. The said artificial and noncompetitive prices so set forth in the said price letters and in said periodical were so relied upon, accepted, and made the basis of prices to be paid by independent distributors to independent producers.

54. Each of the said agreements entered into by the Pure Milk Association with each of the major distributors and each of the independent distributors who purchased fluid milk from the Pure Milk Association provided, among other things, that in the event any dispute should arise between the parties with respect to any of the price provisions of the agreements or that any of the parties thereto should desire a change or modification of said price provisions, and if the parties could not settle such dispute or agree upon the desired changes within a stipulated period of time, the matter in dispute was to be submitted to arbitration.

55. In February 1937 a dispute arose between the Pure Milk Association and the major distributors with respect to the price provisions that were contained in and made a part of the agreements then in effect. Thereafter, an arbitration proceeding was held in which E. W. Tiedeman and the defendants W. A. Wentworth and Leland Spencer acted as arbitrators pursuant to the provisions for arbitration provided in the said agreements. In the arbitration proceeding before the arbitrators, the major distributors, acting as a unit through the agency of Associated Milk Dealers, Inc., and the Pure Milk Association participated actively therein. Notwithstanding the objections of E. W. Tiedeman, the defendants W. A. Wentworth and Leland Spencer, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, did, on February 15, 1937, by an award so-called, fix and determine arbitrary and non-competitive price provisions to be effective thereafter with respect to fluid milk purchased by all distributors from or through the Pure Milk Association under the terms and conditions of the said agreements. The said arbitrary and non-competitive price provisions so fixed and determined by the said award were accepted by the Pure Milk Association and by the major distributors purchasing fluid milk from the Pure Milk Association, and prices for all fluid milk purchased by distributors from or through the Pure Milk Association were fixed on the basis of the said award until May 17, 1937.

56. In April 1937 another dispute arose between the Pure Milk Association and the said major distributors with respect to the price provisions that were contained in and made a part of the agreements then in effect. Thereafter, another arbitration proceeding was held in which E. W. Tiedeman and the defendants W. A. Wentworth and Leland Spencer again acted as arbitrators. In the said arbitra-



tion proceeding, the major distributors, again acting as a unit through the agency of Associated Milk Dealers, Inc., and the Pure Milk Association participated actively therein. Notwithstanding the objections of E. W. Tiedeman, the defendants W. A. Wentworth and Leland Spencer, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, did, on May 17, 1937, by an award so-called, fix and determine arbitrary and non-competitive price provisions to be effective thereafter with respect to fluid milk purchased by all distributors from or through the Pure Milk Association under the terms and conditions of the said agreements. The said arbitrary and non-competitive price provisions so fixed and determined by the said award were accepted by the Pure Milk Association and by the major distributors purchasing fluid milk from the Pure Milk Association, and thereafter until new agreements were made, the prices for all fluid milk purchased by all distributors from or through the Pure Milk Association were fixed on the basis of the said award.

57. The Bottle Exchange, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time, throughout the period covered by this indictment, did:

(i) delay and refuse to return milk bottles and other milk containers to distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid;

(ii) refuse to sell its stock held in its treasury to independent distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid;

(iii) refuse to transfer on its records stock purchased by independent non-stockholder distributors from stockholders who were no longer engaged in the distribution of fluid milk, unless and until said independent non-stockholder distributors agreed to purchase fluid milk at the prices fixed and determined as aforesaid.

58. The defendant Local 753, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, throughout the period covered by this indictment, did:

(i) prevent, hinder, restrain, and impede the transportation of fluid milk into the City of Chicago shipped to independent distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid;

(ii) prevent, hinder, restrain, and impede the distribution within the City of Chicago of fluid milk by independent distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid;

(iii) deny membership in Local 753 to duly qualified drivers in the employ of independent distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid.



Throughout the period covered by this indictment, Local 753 performed the acts and accomplished the purposes set forth in subparagraphs (i) to (iii) above, inclusive, by unlawful threats, intimidation, and acts of violence.

59. The defendant Leslie G. Goudie, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, throughout the period covered by this indictment, did:

(i) counsel, advise and direct the defendant Local 753 and the officials and agents of Local 753 with respect to the acts described in paragraph 58 above;

(ii) through the instrumentality of the Joint Council of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, prevent the delivery of daily supplies of meat, bread, bakery products, vegetables, and other foods by members of unions affiliated with the said Joint Council to places of business served by the independent distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid.

60. The defendant Daniel A. Gilbert, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time during the period covered by this indictment, did:

(i) select officers of various local teamsters' and chauffeurs' unions who composed the Joint Council;

(ii) counsel, advise and direct the said officials and the said defendant Local 753 with respect to the acts described in paragraph 58 above;

(iii) counsel and advise the defendant Leslie G. Goudie with respect to the acts described in paragraph 59 above;

(iv) protect the officials, agents, and members of Local 753 from arrest and prosecution for performing the acts mentioned in paragraph 58 above.

61. The defendants Herman N. Bundesen, Paul Krueger and William J. Guerin, in disregard of their lawful duties as officials and agents of the Board of Health of the City of Chicago, and acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) give preferential treatment in the matter of the inspection and approval of dairy farms to member-producers, and to independent producers selling fluid milk to the major distributors at prices fixed and determined as aforesaid;

(ii) impose unwarranted, arbitrary, illegal, and unreasonable burdens on independent producers who refused to sell their fluid milk at the prices fixed and determined as aforesaid;

(iii) refuse to inspect dairy farms of independent producers who desired to sell fluid milk to independent distributors in the City of Chicago, but who refused to sell such fluid milk at prices fixed and

determined as aforesaid, notwithstanding the fact that, as was well known to the said defendants, the dairy farms of the said independent producers were located in close proximity to approved dairy farms.

#### VI. JURISDICTION AND VENUE

62. The combination and conspiracy hereinbefore alleged was designed and has operated and has been carried out, in part, within the Eastern Division of the Northern District of Illinois. The Pure Milk Association, acting in concert with the other defendants, and pursuant to and in execution of said combination and conspiracy, has contracted for and has sold to the major distributors and to independent distributors within said District, large quantities of fluid milk produced on approved dairy farms located in the States of Illinois, Indiana, Michigan, and Wisconsin at the artificial, arbitrary, and noncompetitive prices aforesaid. The major distributors within said District, acting in concert, with the other defendants, and pursuant to and in execution of said combination and conspiracy, have contracted to purchase and have purchased large quantities of fluid milk from member-producers and independent producers at the artificial, arbitrary, and noncompetitive prices aforesaid. The said fluid milk produced, sold, and purchased as aforesaid was transported and shipped by over-the-road motor vehicles and by railroad in interstate commerce into the City of Chicago within said District. That part of said fluid milk sold by the Pure Milk Association as aforesaid, and that part of the said fluid milk purchased by the defendant major distributors as aforesaid, which was produced on approved dairy farms located in the State of Illinois was sold and was purchased for the purpose of adding said fluid milk to an existing current of interstate trade and commerce in fluid milk with the intention that said fluid milk from the State of Illinois would become a part of the current of interstate commerce in fluid milk produced in states outside the State of Illinois. The activities of all the defendants herein have operated, and do operate, substantially and directly to restrain and burden the untrammelled shipment and movement of said fluid milk in interstate commerce into and within the City of Chicago, in said District.

And so the grand jurors aforesaid, upon their oaths aforesaid, do further present that the defendants named, at the time and place and in the manner and form aforesaid, unlawfully have combined and conspired to restrain trade and commerce in fluid milk among the several states of the United States, against the peace and dignity of the United States and contrary to the form of the statute of the United States in such case made and provided.

#### COUNT TWO

And the grand jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege and incorporate, as if herein set forth in full, each of the allegations set forth in paragraphs 1 to 46, inclusive, of Count One of this indictment.

## 17 THE COMBINATION AND CONSPIRACY

63. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that beginning in the month of January 1935, and continuously thereafter up to and including the date of the presentment of this indictment, all the defendants named herein and other persons to the grand jurors unknown, well knowing all the facts heretofore alleged in this indictment, unlawfully have combined and conspired together and engaged with one another to fix and maintain by common and concerted action, uniform, arbitrary, and non-competitive prices for the sale by the distributors in the City of Chicago of fluid milk shipped into the said City from the States of Illinois, Indiana, Michigan, and Wisconsin. In so doing, the defendants have then and there engaged in an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies."

64. Said unlawful combination and conspiracy was intended to be effected and has been effected by divers means and methods, including, among others, the following, that is to say:

65. Beginning in the month of January 1935, and thereafter at different times throughout the period of time covered by this indictment, Associated Milk Dealers, Inc., Pure Milk Association, and the major distributors, acting by, through, and under the direction of their representatives, officers, agents, and employees, hereinbefore made defendants, and by and through others of their officers and agents, and other persons to the grand jurors unknown, did meet together and hold conferences at divers times and places in the City of Chicago and did then and there agree upon and fix uniform, arbitrary, and non-competitive prices to be exacted from and paid by purchasers of fluid milk sold in the City of Chicago. In agreeing upon and fixing the said uniform, arbitrary, and non-competitive prices, the said defendants intended to and did compel and coerce independent distributors to exact the said uniform, arbitrary, and non-competitive prices from all persons who purchased fluid milk in the City of Chicago from independent distributors.

66. The major distributors, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, throughout the period of time covered by this indictment, did:

- (i) observe and maintain the prices so fixed for fluid milk;
- (ii) sell and distribute all fluid milk which they sold in the City of Chicago at the said uniform, arbitrary, and non-competitive prices, and pursuant to the said combination and conspiracy;
- (iii) refuse to sell fluid milk to any purchaser in the City of Chicago except at the said uniform, arbitrary, and non-competitive prices.

67. The Associated Milk Dealers, Inc., acting in concert with the other defendants and pursuant to and in execution of the said com-

bination and conspiracy hereinbefore alleged, from time to time, throughout the period covered by this indictment, did:

(i) endeavor to procure independent distributors to sell fluid milk only at the said prices so fixed;

(ii) inform independent distributors of the prices fixed as aforesaid;

(iii) by and through the defendants Paul Potter and Otto Black, and other persons whose names are unknown to the grand jurors, persuade and coerce independent distributors not to sell fluid milk in the City of Chicago at prices lower than those fixed as aforesaid.

68: Throughout the period covered by this indictment, the Pure Milk Association, acting in concert with the other defendants and pursuant to and in execution of the said combination and conspiracy hereinbefore alleged, did refuse to sell or deliver fluid milk to distributors who would not agree to maintain and who did not maintain the said prices fixed as aforesaid.

69. The grand jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege, and incorporate, as if herein set forth in full, each of the allegations set forth in paragraphs 54 to 56, inclusive, of Count One of this indictment. The defendants, W. A. Wentworth and Leland Spencer, on February 15, 1937, and May 17, 1937, did fix and determine the arbitrary and non-competitive basis for computing the prices of all fluid milk purchased by distributors through the Pure Milk Association, as described in paragraphs 55 and 56 of Count One of this indictment, acting in concert with the other defendants and acting pursuant to and in execution of the combination and conspiracy hereinbefore alleged, well knowing and intending that the said basis so fixed and determined would likewise fix and determine the prices to be paid by all purchasers of fluid milk from distributors in the City of Chicago. The arbitrary and non-competitive basis for computing the prices of fluid milk purchased by distributors through the Pure Milk Association, fixed and determined by the arbitrators as described in paragraphs 55 and 56 of Count One of this indictment, did in fact fix and determine the prices paid by all persons who purchased fluid milk from distributors in the City of Chicago, which prices were arbitrary and noncompetitive.

70. The Bottle Exchange, acting in concert with the other defendants and pursuant to and in execution of the said combination and conspiracy, from time to time, throughout the period covered by this indictment, did:

(i) delay and refuse to return milk bottles and other milk containers to distributors who refused to maintain the prices fixed as aforesaid;

(ii) refuse to sell its stock held in its treasury to independent distributors who refused to maintain the prices for fluid milk fixed as aforesaid;

(iii) refuse to transfer on its records stock purchased by independent non-stockholder distributors from stockholders who were no



longer engaged in the distribution of fluid milk, unless and until said independent non-stockholder distributors agreed to sell fluid milk at prices not lower than those fixed as aforesaid.

71. The defendant Local 753, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, throughout the period covered by this indictment, did:

(i) prevent, hinder, restrain, and impede the transportation in interstate commerce of fluid milk to the City of Chicago for distribution by distributors who refused to maintain the prices for fluid milk fixed and determined as aforesaid;

(ii) prevent, hinder, restrain, and impede the distribution within the City of Chicago of fluid milk by distributors who refused to maintain the prices for fluid milk fixed and determined as aforesaid;

(iii) deny membership in Local 753 to duly qualified drivers in the employ of independent distributors who did not comply with and maintain the prices for fluid milk fixed as aforesaid;

(iv) compel independent distributors to sell fluid milk at the uniform, arbitrary, and non-competitive prices aforesaid. Throughout the period covered by this indictment, Local 753 performed the acts and accomplished the purposes set forth in sub-paragraphs (i) to (iv) above inclusive, by unlawful threats, intimidation, and acts of violence.

72. The defendant Leslie G. Goudie, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, throughout the period covered by this indictment, did:

(i) counsel, advise, direct, and cause the defendant Local 753 and the officials and agents of Local 753 to perform the acts described in paragraph 71 above;

(ii) through the instrumentality of the Joint Council of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, prevent the daily deliveries of meat, bread, bakery products, vegetables, and other foods by members of unions affiliated with the said Joint Council to places of business served by independent distributors who did not agree to maintain and did not maintain the prices for fluid milk fixed as described above.

73. The defendant Daniel A. Gilbert, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time during the period covered by this indictment, did:

(i) select officers of various local teamsters' and chauffeurs' unions who composed the Joint Council;

(ii) counsel, advise, direct, and cause the said officials and the Local 753 to perform the acts described in paragraph 71 above;

(iii) counsel and advise the defendant Leslie G. Goudie with respect to the acts described in paragraph 72 above;

(iv) protect the officials, agents, and members of Local 753 from arrest and prosecution for performing the acts mentioned in paragraph 71 above.



74. The defendants Herman N. Bundesen, Paul Krueger, and William J. Guérin, in disregard of their lawful duties as officials and agents of the Board of Health of the City of Chicago, and acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) give preferential treatment in the matter of the inspection and approval of dairy farms to producers selling their fluid milk to distributors who had agreed to maintain and who did maintain the arbitrary, artificial, and non-competitive prices fixed as aforesaid:

(ii) impose unwarranted, arbitrary, illegal, and unreasonable burdens upon producers who sold fluid milk to distributors who did not agree to maintain and did not maintain the said prices fixed as aforesaid;

(iii) impose unwarranted, arbitrary, illegal, and unreasonable burdens on distributors who refused to maintain the arbitrary, artificial, and non-competitive prices fixed as aforesaid and who sold fluid milk at prices lower than the said prices fixed as aforesaid.

## II. JURISDICTION AND VENUE

75. The combination and conspiracy hereinbefore alleged was designed and has operated and has been carried out, in part, within the Eastern Division of the Northern District of Illinois. During and throughout the period covered by this indictment, the major distributors, within said District, acting in concert with the other defendants, and pursuant to and in execution of said combination and conspiracy, have contracted to purchase, and have purchased, large quantities of fluid milk produced on approved dairy farms located in the States of Illinois, Indiana, Michigan, and Wisconsin from member-producers and independent producers; and have sold and distributed large quantities of said fluid milk in the City of Chicago within said District at the uniform, arbitrary and non-competitive prices fixed, maintained, and controlled as aforesaid. The activities of all the defendants herein have operated, and do operate, substantially and directly to restrain and burden the untrammelled shipment and movement of said fluid milk in interstate commerce into and within the City of Chicago, in said District.

And so the grand jurors aforesaid, upon their oaths aforesaid, do further present that the defendants named, at the time and place and in the manner and form aforesaid, unlawfully have combined and conspired to restrain trade and commerce in fluid milk among the several states of the United States, against the peace and dignity of the United States and contrary to the form of the statute of the United States in such case made and provided.

## COUNT THREE

And the grand jurors aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege, and incorporate, as if herein set forth in

full, each of the allegations set forth in paragraphs 1 to 46, inclusive, contained in Count One of this indictment.

#### I. THE COMBINATION AND CONSPIRACY

76. And the grand jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do further present that beginning in the month of January 1935, and continuously thereafter up to and including the date of the presentment of this indictment, all of the defendants named herein and other persons to the grand jurors unknown; well knowing all of the facts heretofore alleged in this indictment, unlawfully have combined and conspired together and engaged with one another to hinder and to prevent prospective independent distributors from engaging in the business of distributing fluid milk in the City of Chicago, to hinder and to prevent existing independent distributors from distributing fluid milk in the City of Chicago in competition with the major distributors, to hinder and to prevent the distribution of fluid milk to stores and by stores in the City of Chicago and to hinder and to prevent any distribution of fluid milk in the City of Chicago, except by the method and in the manner determined by said defendants. In so doing, the defendants have then and there engaged in an unlawful combination and conspiracy in restraint of trade and commerce in said fluid milk among the said several states of the United States, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies."

77. Said unlawful combination and conspiracy was intended to be effected, and has been effected, by divers means and methods, including, among others, the following that is to say:

78. The major distributors, acting in concert with one another and with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) agree to refrain and, in accordance with such agreement, refrained from competing with each other for customer accounts, which are hereinafter referred to as stops, the term by which such accounts are known in the fluid milk business in the City of Chicago;

(ii) refuse to serve any stop which any other distributor was serving unless allowed to serve such stop exclusively;

(iii) obtain, by means of cash payments, loans, gifts of merchandise, gifts or loans of equipment or fixtures, special discounts, special prices and other gratuities, the privilege of serving stops exclusively.

79. The Associated Milk Dealers, Inc., acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did adopt and enforce a rule requiring independent distributors to refrain from taking stops of major distributors.

80. The Pure Milk Association, acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i), refuse to sell fluid milk to independent distributors who attempted to take, or did take, stops of the defendant major distributors;

(ii) refuse to sell fluid milk to independent distributors who distributed fluid milk by a method and in a manner other than that determined by the said defendants;

(iii) subsidize and operate surreptitiously a bogus independent distributor.

81. The defendants W. A. Wentworth and Leland Spencer, on February 15, 1937, and May 17, 1937, acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, well knowing and intending the consequences of their act, rendered an award so-called (which is described in paragraphs 55 and 56 of Count One of this indictment and each of the allegations of said paragraphs is hereby reaffirmed, realleged, and incorporated as if herein set forth in full).

82. The Milk Dealers Bottle Exchange, acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) delay the return of, and refuse to return, bottles of independent distributors;

(ii) refuse to sell to independent distributors stock of the Milk Dealers Bottle Exchange and to recognize sales of stock of the Milk Dealers Bottle Exchange made to independent distributors by owners of such stock.

83. Local 753, acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) compel and coerce prospective independent distributors to acquire the business of existing fluid milk distributors, as a condition precedent to entering into the business of distributing fluid milk in the City of Chicago;

(ii) compel and coerce independent distributors to observe certain unwritten rules with respect to the distribution of fluid milk, which rules required, among other things, that not more than one distributor should serve any one stop, and that no independent distributor should take steps away from major distributors;

(iii) refuse to enter into labor contracts with independent distributors except upon condition that said independent distributors observe the said unwritten rules referred to in subparagraph (ii) above;

(iv) compel and coerce proprietors of stores to refrain from distributing fluid milk at said stores in the City of Chicago;

(v) compel and coerce independent vendor distributors (that is to say, persons, firms, or corporations, who are distributors, but who do not operate a milk plant) to refrain from distributing fluid milk in the City of Chicago.

During the period covered by this indictment, Local 753 performed the acts and accomplished the purposes set forth in subparagraphs (i) to (v), inclusive, above, by threats, intimidation, violence, and by other unlawful acts, and more particularly, by:

- (a) picketing of stores distributing fluid milk;
- (b) engaging in secondary boycotts;
- (c) threatening to injure and injuring persons;
- (d) threatening to damage and destroy, and damaging and destroying, property;
- (e) attempting forcibly to detain, and forcibly detaining, employees of distributors;
- (f) threatening to call and calling strikes of employees of distributors.

84. The defendant Leslie G. Goudie, acting in concert with all of the defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) counsel, advise, direct, and cause the defendant Local 753, and the officials and agents of Local 753, to perform the acts described in paragraph 83;

(ii) prevent, through the instrumentality of the Joint Council of the International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, the daily deliveries of meat, bread, bakery products, vegetables, and other foods by members of unions affiliated with said Joint Council to stores being served by independent distributors and vendor distributors.

85. The defendant, Daniel A. Gilbert, acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time during the period covered by this indictment, did:

(i) select the officials of various local teamsters' and chauffeurs' unions who composed the Joint Council;

(ii) counsel, advise, direct, and cause the said officials and said Local 753 to perform the acts described in paragraph 83 above;

(iii) counsel and advise the defendant, Leslie G. Goudie, with respect to the acts described in paragraph 84 above;

(iv) protect the officials, agents, and members of Local 753 from arrest and prosecution for performing acts mentioned in paragraph 83 above.

86. The defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin, in disregard of their lawful duties as officials and agents of the Board of Health of the City of Chicago, and acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time during the period covered by this indictment, did:



(i) refuse, upon arbitrary and capricious grounds not within the scope of the authority conferred upon the said defendants by the ordinances of the City of Chicago and the rules and regulations promulgated thereunder, to grant permits to prospective distributors;

(ii) require that independent distributors purchase and install new and expensive equipment and fixtures, construct new buildings and alter old buildings, which requirements were not within the scope of the authority conferred upon them by the ordinances of the City of Chicago and the rules and regulations promulgated thereunder;

(iii) close, arbitrarily, and capriciously, and without notice and an opportunity for hearing, the plants of independent distributors for minor or feigned charges of infraction of the ordinances of the City of Chicago and the rules and regulations promulgated thereunder;

(iv) harass and annoy, continually, independent distributors by minor or feigned charges of infraction of the ordinances of the City of Chicago and the rules and regulations promulgated thereunder;

(v) refuse to inspect the farms of independent producers intending to supply fluid milk to independent distributors;

(vi) cancel and revoke, arbitrarily, capriciously, and without notice and opportunity for hearing, upon minor or feigned charges of infraction of the ordinances of the City of Chicago, or of the rules and regulations promulgated thereunder, the permits of producers to ship milk into the City of Chicago.

## II. JURISDICTION AND VENUE

87. The combination and conspiracy hereinbefore alleged was designed and has operated and has been carried out, in part, within the Eastern Division of the Northern District of Illinois. During and throughout the period covered by this indictment, the major distributors, within said District, acting in concert with the other defendants, and pursuant to and in execution of said combination and conspiracy, have transported into the City of Chicago, within said District, and there distributed, large quantities of fluid milk produced on approved dairy farms located in the States of Illinois, Indiana, Michigan, and Wisconsin. All of the said defendants, acting in concert with one another and pursuant to and in execution of the said combination and conspiracy, have hindered and prevented prospective independent distributors from engaging in the business of distributing fluid milk in the City of Chicago, and have hindered and prevented existing independent distributors from distributing fluid milk in the City of Chicago in competition with the major distributors, and have hindered and prevented the distribution of fluid milk to stores and by stores in the City of Chicago, and have hindered and prevented any distribution of fluid milk in the City of Chicago, except by the method and in the manner determined by the said de-

defendants. The activities of the defendants herein have operated and do operate, substantially and directly, to restrain and burden the untrammelled shipment and movement of said fluid milk in interstate commerce into and within the City of Chicago, in the said District.

And so the grand jurors aforesaid, upon their oaths aforesaid, do further present that the defendants named, at the time and place and in the manner and form aforesaid, unlawfully have combined and conspired to restrain trade and commerce in fluid milk among the several states of the United States, against the peace and dignity of the United States and contrary to the form of the statute of the United States in such case made and provided.

#### COUNT FOUR

And the grand jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege, and incorporate, as if herein set forth in full, all of the allegations set forth in paragraphs 1 to 46, inclusive, of Count One of this indictment.

#### I. THE COMBINATION AND CONSPIRACY

88. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that beginning in the month of January 1935, and continuously thereafter up to and including the date of the presentment of this indictment, all of the defendants named herein, and other persons to the grand jurors unknown, well knowing all of the facts heretofore alleged in this indictment, unlawfully have combined and conspired together and engaged with one another and with divers other persons to restrict, limit, and control and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce into the City of Chicago from the States of Illinois, Indiana, Michigan, and Wisconsin. In so doing, said defendants have then and there engaged in an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the several states of the United States in violation of Section 1 of the Act of Congress approved July 2, 1900, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies."

89. The said unlawful combination and conspiracy was intended to be effected and has been effected by divers means and methods, including among others the following that is to say:

90. The Pure Milk Association, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time, throughout the period covered by this indictment, did:

(i) enforce a base-surplus plan of production, so-called, with respect to all member-producers who had been members since 1929, and made it a condition precedent before any new producers were admitted as member-producers that they accept the base-surplus plan;

(ii) limit, through the base-surplus plan, the total production of fluid milk of member-producers by:

(a) assigning arbitrarily to each member-producer a production quota, known as a base;

(b) requiring each member-producer to ship exclusively his total fluid milk production to a designated distributor;

(c) adjusting periodically the aggregate bases of member-producers so as to conform to the total fluid milk sales of the distributors to whom the member-producers were allocated;

(d) establishing a method of classification of fluid milk produced by its member-producers into two arbitrary classes for the purpose of determining payment, namely, (1) fluid milk produced by a member-producer up to the amount of his base, called base milk, and (2) milk produced by a member-producer in excess of his base, called surplus milk or excess deliveries; and

(e) providing that the member-producers should receive a substantially lower price for surplus milk or excess deliveries than base milk, notwithstanding the fact that the surplus milk was of the same grade and quality as the base milk, thus diminishing initiative and the economic incentive of member-producers to produce on approved dairy farms and to offer for sale in the City of Chicago any fluid milk in excess of the amount prescribed as their base by the Pure Milk Association and the major distributors;

(iii) adjust and regulate its membership arbitrarily;

(iv) coerce and compel, by threats and intimidation, member-producers, dissatisfied with the base-surplus plan, to refrain from withdrawing from the Pure Milk Association;

(v) prevent, hinder, restrain, and delay, by threats, intimidation, and destruction of property, the transportation and delivery of fluid milk to the City of Chicago to independent distributors, which was purchased from independent producers, thereby limiting the amount of fluid milk available to supply the fluid-milk requirements of the people of the City of Chicago.

91. The major distributors, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) enter into agreements with the Pure Milk Association to purchase substantially all of their requirements of fluid milk for their sales in the City of Chicago from the Pure Milk Association (said agreements being more fully described in paragraphs 49 to 54, inclusive, of Count One; each of the allegations set forth in said paragraphs 49 to 54, inclusive, of Count One of this indictment, being hereby reaffirmed, realleged, and incorporated as if herein set forth in full);

(ii) agree to pay member-producers in accordance with the base-surplus plan described as aforesaid;

(iii) participate in the establishment and determination of the bases of member-producers whereby the aggregate bases of the mem-

ber-producers shipping to major distributors were adjusted so that the said aggregate bases were made to conform to the total fluid milk sales of distributors;

(iv) assist the Pure Milk Association in coercing and compelling, by divers threats and means, independent producers to join the Pure Milk Association so as to place under control the production of fluid milk of the said independent producers;

(v) coerce and compel, by divers threats and means, member-producers, dissatisfied with the base-surplus plan, to refrain from withdrawing from the Pure Milk Association.

92. The defendants W. A. Wentworth and Leland Spencer, on February 15, 1937, and May 17, 1937, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, rendered an award so-called (as described in paragraphs 55 and 56 of Count One of this indictment; each of the allegations of said paragraphs being hereby reaffirmed, realleged, and incorporated as if herein set forth in full) and did then and there fix and determine a substantially lower price for surplus milk than that fixed and determined for base milk. The effect of said award was to limit, control, and restrict the supply of fluid milk flowing through the channels of interstate commerce and entering the City of Chicago, all of which was well known and intended by the said defendants in rendering said award.

93. The Associated Milk Dealers, Inc., acting in concert with the other defendants and pursuant to and in execution of the said combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) participate in the establishment and determination of the bases of member-producers whereby the aggregate bases of the member-producers, shipping to major distributors, were adjusted so that the said aggregate bases were made to conform to the total fluid milk sales of the major distributors;

(ii) assist the Pure Milk Association in coercing and compelling, by divers threats and means, independent producers to join the Pure Milk Association so as to place under control the production of fluid milk of the said independent producers;

(iii) coerce and compel, by divers threats and means, member-producers, dissatisfied with the base-surplus plan, to refrain from withdrawing from the Pure Milk Association.

94. The Bottle Exchange, acting in concert with the other defendants and pursuant to and in execution of the said combination and conspiracy, from time to time throughout the period covered by this indictment, did:

(i) delay and refuse to return milk bottles and other milk containers to independent distributors who attempted to induce member-producers to withdraw from and refuse to sell their milk through the Pure Milk Association;

(ii) refuse to sell its stock held in its treasury to independent distributors who attempted to induce member-producers to withdraw



from and refuse to sell their milk through the Pure Milk Association;

(iii) refuse to transfer on its records stock purchased by independent nonstockholder distributors from stockholders who were no longer engaged in the distribution of fluid milk, unless and until said nonstockholder independent distributors refrained from inducing member-producers to withdraw from and refuse to sell their milk through the Pure Milk Association.

95. Local 753, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) resort to threats, acts of violence or other coercive means directed or exerted against independent distributors who attempted to induce member-producers to withdraw from and refuse to sell their milk through the Pure Milk Association;

(ii) deny membership in Local 753 to duly qualified drivers in the employ of independent distributors who attempted to induce member-producers to withdraw from and refuse to sell their milk through the Pure Milk Association;

(iii) prevent, hinder, restrain, and delay the transportation and delivery of fluid milk into the City of Chicago to independent distributors, which was purchased from independent producers, thereby limiting the amount of fluid milk available to supply the fluid milk requirements of the people of the City of Chicago.

Local 753 performed the acts and accomplished the practices set forth in sub-paragraphs (i) to (iii) above, inclusive, by unlawful threats, intimidation, and acts of violence.

96. The defendant Leslie G. Goudie, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, throughout the period covered by this indictment, did:

(i) counsel, advise, and direct the defendant Local 753 and the officials and agents of Local 753 with respect to the acts described in paragraph 95 above;

(ii) prevent, through the instrumentality of the Joint Council of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, the delivery of daily supplies of meat, bread, bakery products, vegetables, and other foods by members of unions affiliated with the said Joint Council to places of business served by the independent distributors who did not agree to take their milk through the Pure Milk Association.

97. The defendant Daniel A. Gilbert, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time during the period covered by this indictment, did:

(i) select officers of various local teamsters' and chauffeurs' unions who composed the Joint Council;

- (ii) counsel, advise, and direct the said officials and the defendant Local 753 with respect to the acts described in paragraph 95 above;
- (iii) counsel and advise the defendant Leslie G. Goudie with respect to the acts described in paragraph 96 above;
- (iv) protect the officials and agents and members of Local 753 from arrest and prosecution for performing the acts mentioned in paragraph 95 above.

98. The defendants Herman N. Bundesen, Paul Krueger, and William J. Guerin, in disregard of their lawful duties as officials and agents of the Board of Health of the City of Chicago, and acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

- (i) give preferential treatment in the matter of inspection and approval of dairy farms of member-producers;
- (ii) impose unwarranted, arbitrary, illegal, and unreasonable burdens upon independent producers;
- (iii) refuse to inspect dairy farms of independent producers, notwithstanding, as was well known to the defendants, the farms of the said independent producers were located in close proximity to other approved dairy farms.

## II. JURISDICTION AND VENUE

99. The combination and conspiracy hereinbefore alleged was designed and has operated and has been carried out, in part, within the Eastern Division of the Northern District of Illinois. During and throughout the period covered by this indictment, the Pure Milk Association and the major distributors, acting in concert with the other defendants, and pursuant to and in execution of said combination and conspiracy, have contracted to buy and to sell and have bought and sold within said District, large quantities of fluid milk produced on approved dairy farms located in the States of Illinois, Indiana, Michigan, and Wisconsin in accordance with the base-surplus plan of production and payment aforesaid. The said base-surplus plan of payment was intended to and does restrict, limit, and control, restrain and obstruct the supply of fluid milk entering the City of Chicago, by arbitrarily limiting the quantity of fluid milk for which a member-producer may be paid the base price, as aforesaid. The activities of all the defendants herein have operated, and do operate, substantially and directly to restrain and burden the untrammelled shipment and movement of said fluid milk in interstate commerce into and within the City of Chicago, in said District.

And so the grand jurors aforesaid, upon their oaths aforesaid, do further present that the defendants named, at the time and place and in the manner and form aforesaid, unlawfully have combined and conspired to restrain trade and commerce in fluid milk in the several states of the United States, against the peace and dignity of the

United States and contrary to the form of the statute of the United States in such case made and provided.

MICHAEL L. IGOE,  
United States Attorney.

[No. 31197. United States District Court, Northern District of Illinois, Eastern Division. The United States of America vs. The Borden Company et al. Indictment. Vio: Sec. 1, Act of Congress, July 2, 1890: "An Act To Protect Trade and Commerce Against Unlawful Restraints and Monopolies." A true bill. E. J. Lambe, Foreman. Filed in open Court this 1st day of November, A. D. 1938. Henry W. Freeman, Clerk.]

18

In United States District Court

[Title omitted.]

*Demurrer of defendant Daniel A. Gilbert*

Filed January 6, 1939

Now comes the defendant, Daniel A. Gilbert, by Thomas Dodd Healy, his attorney, and having read the indictment herein says that said indictment and each count thereof, and the matters therein contained, in manner and form as the same are therein alleged and set forth, are insufficient in law to require this defendant to plead to said indictment or any count thereof, or to answer the same, and that said indictment, and each count thereof, are insufficient in law to sustain a judgment against this defendant; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, demurs to said indictment and each count thereof and moves to quash the same upon the following grounds:

1. Said indictment, and each count thereof, does not aver or set forth any facts or allege or charge the commission of any acts by the defendant constituting an offense against the United States of America.

2. Said indictment, and each count thereof, in purporting to allege an offense against the United States of America, fails to do so with the certainty required by law, but on the contrary are vague, indefinite, and uncertain to such an extent that this defendant is not advised thereby of the nature of the charges against him, so that he may properly prepare and submit his defense.

3. Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," has been so amended, altered, modified, and restricted by the Act of Congress of February 18, 1922, entitled, "An Act to Authorize Association of Producers of Agricultural Products," as to deny to this defendant due process of law and equal protection of the laws in contravention of the Fifth Amendment of the Constitution of the United States of America, that is to say,

(a) Said Act of July 2, 1890, as amended, altered, modified, and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and other persons, including this defendant, and  
20 other associations, with respect to the definition, prohibition, and punishment of monopolies and restraints of trade in interstate trade and commerce.

(b) Said Act of July 2, 1890, so modified, amended, qualified, and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and all other persons, including this defendant, and other associations, by legalizing certain monopolies and restraints of interstate trade and commerce by such producers which are forbidden if intended or accomplished by others.

4. The indictment is void in that it was returned, without authority of law, at the October Term of this Court in the year 1938, by a Grand Jury impaneled and sworn at the July Term of said Court in the year 1938 and illegally sitting during said October Term, that is to say,

(a) The orders of August 31, 1938, and September 27, 1938, authorizing the Grand Jury to sit, respectively, during the September and October 1938 terms of the District Court, do not find or disclose that this indictment was the result of an investigation begun but not finished during said July Term, or that any investigation was begun but not finished during said July 1938 Term of this Court.

21 (b) The indictment does not show that the investigations alleged to have been begun but not finished during the July 1938 Term were not completed in the September 1938 Term.

5. None of the counts of said indictment states facts showing that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say,

(a) The first paragraph of each count, which undertakes to describe the supposed combination and conspiracy therein alleged, does not state facts showing that the matters and things therein complained of are or were an undue or unreasonable restraint of interstate trade and commerce.

(b) The means by which said supposed combinations and conspiracies were intended to be effected are not stated in said indictment or in any count thereof.

(c) It does not appear from the allegations of said counts or of any of them that the objects or purposes of said supposed combinations and conspiracies or of any of them were intended to be accomplished by any means which would effect an undue or unreasonable restraint of interstate trade or commerce.

(6) The allegations of Count Three of said indictment are insufficient to give this Court jurisdiction over the matters and things therein set forth, and wholly fail to state an offense against the United States of America, that is to say,



22 (a) It is not shown by the allegations of said count that the alleged acts of the defendant, therein complained of, restrain or restrained interstate trade or commerce.

(b) It does not appear that the business of distributing fluid milk in the City of Chicago, alleged to have been hindered and prevented, involved interstate trade and commerce.

7. The allegations of Count Four of said indictment do not show that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States; that is to say—

(a) It appears from said allegations that the object and effect of the said supposed combination and conspiracy therein alleged was the adoption of the base-surplus plan, and it does not appear that the base-surplus plan is or was an unlawful or unreasonable restraint of trade or commerce.

(b) It appears from the allegations of the indictment that the alleged restraint and control complained of in Count Four was and is restraint and control of production and not restraint or control of the commerce among the several states.

(c) It does not appear by the allegations of said count that the base-surplus plan limits or restrains either the production of milk or trade and commerce in milk.

23 8. This defendant shows the Court that the allegations of the indictment, and of each count thereof, are insufficient to show that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, in that it appears by said allegations that said defendant was not engaged in commerce or trade in the milk industry or in any branch thereof, and was in fact fully and lawfully performing the duties of his office as Chief Investigator for the State's attorney of Cook County, Illinois.

9. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, this defendant prays judgment that this demurrer be sustained as to him; that said indictment, and each count thereof, be quashed, and that he be dismissed and discharged of this indictment by the Court.

By (Signed) DANIEL A. GILBERT,  
THOMAS DODD HEALY,  
*His Attorney.*

THOMAS DODD HEALY.

25 In United States District Court

[Title omitted.]

Notice

To Messrs. WILLIAM J. CAMPBELL, *United States Attorney*,  
LEO F. TIERNEY, *Special Assistant Attorney General*.

Please take notice that we have this day filed in the above entitled cause the joint and several demurrer and motion to quash of the defendants, Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi, the said demurrer and motion to quash containing certain specifications of the grounds upon which we shall rely in the presentation thereof; a copy of which said demurrer and motion to quash is handed you herewith.

LOUIS E. HART,  
IRVING HERRIOTT,  
L. EDWARD HART, JR.,  
*Attorneys for said Defendants.*

Dated at Chicago, Illinois, January 7, 1939.

Received a copy of the foregoing notice and of the demurrer and motion to quash therein referred to this 7th day of January 1939.

LEO F. TIERNEY,  
By D. B. BRITT.  
WM. J. CAMPBELL.

26 In United States District Court

[Title omitted.]

*Joint and several demurrer of Defendants Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi, and of each of them, to the indictment herein, and motion of said defendants and each of them to quash said indictment*

Filed January 7, 1939

Now come the defendants Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi, and each of them, by Louis E. Hart, Irving Herriott, and L. Edward Hart, Jr., their attorneys, and having read the indictment herein say that the said indictment and each count thereof, and the matters therein contained in manner and form as the same are therein alleged and set forth, are not sufficient in law to require these defendants, or any or either of them, to plead to said indictment or any count thereof, or to answer the same, and that said indictment and each count thereof is not sufficient in law to warrant the rendition of any legal judgment thereon. And without intending to waive

any other substantial causes of demurrer by the enumeration of the following specific causes, demur to said indictment and each count thereof and move to quash the same upon the following grounds:

1. Said indictment and each count thereof does not aver or set forth any facts or allege or charge the commission of any acts by these defendants, or any or either of them, constituting an offense against the United States of America.

27 2. Said indictment and each count thereof, in purporting to allege an offense against the United States of America, fails to do so with the certainty required by law, but, on the contrary, is vague, indefinite, and uncertain to such an extent that these defendants and each of them is not advised thereby of the nature of the charges against them, and each of them, so that they and each of them may properly prepare and submit their several defenses.

3. Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," has been so amended, altered, limited, modified, and restricted by various Acts of Congress including, among others, the Act of Congress of February 18, 1922, entitled "An Act to Authorize Association of Producers of Agricultural Products," as to deny to defendants due process of law and equal protection of the laws in contravention of the Fifth Amendment of the Constitution of the United States, that is to say:

(a) Said Act of July 2, 1890, as amended, altered, modified, and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and other persons, including these defendants, and other associations, with respect to the definition, prohibition, and punishment of monopolies and restraints of trade in interstate trade and commerce.

(b) The said Act of Congress of July 2, 1890, has been so modified, amended, qualified, and restricted, as aforesaid, that it creates an arbitrary and unreasonable discrimination between certain producers of agricultural products and all other persons, including these defendants, by legalizing certain monopolies and restraint of trade by certain producers of agricultural products which would otherwise be forbidden under Section 1 of the said Act of Congress of July 2, 1890, if intended or accomplished by others than such producers of agricultural products.

28 4. The indictment is void in that it was returned without authority of law at a term of this court which was not the term at which the Grand Jury which returned the indictment was convened, for the following reasons:

(a) Neither the order of July 31, 1938, nor the order of September 27, 1938, entered by this court, each of which purports to authorize the Grand Jury to sit beyond the July 1938 term of this court, contains findings of fact to the effect that there was any unfinished investigation begun by said Grand Jury at the July 1938 term of

this court which would warrant this court in permitting said Grand Jury to continue to sit beyond said July 1938 term thereof, in accordance with the provisions of Section 284 of the Act of Congress of March 3, 1911, entitled "An Act to Codify, Revise, and Amend the Laws Relating to Judiciary" as amended (U. S. Code Annotated, Title 28, Section 421).

(b) That the orders of August 31, 1938, and of September 27, 1938, were entered several days prior to the termination of the August 1938 and of the September 1938 terms, respectively, of this court in violation of Section 284 of the Act of Congress of March 3, 1911, entitled "An Act to Codify, Revise, and Amend the Laws Relating to Judiciary" as amended (U. S. Code Annotated, Title 28, Section 421).

(c) The indictment fails to disclose that any investigation begun by the Grand Jury in the July 1938 term of this court was not completed prior to the October 1938 term.

29 (d) This court had no authority to authorize said Grand Jury to sit during the October 1938 term of this court on its request because by order entered on August 31, 1938, this court had attempted to authorize said Grand Jury to sit during the September 1938 term of this court.

5. Each of the four counts of the said indictment fails to allege facts sufficient to show an unlawful combination and conspiracy or means to render said alleged combination and conspiracy unlawful under Section 1 of the Act of Congress dated July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraint and Monopolies."

6. Each and every count of the indictment is duplicitous in that there are alleged in each count thereof separate distinct and unrelated offenses against the United States of America.

7. Count 2 of said indictment fails to state facts sufficient to constitute a crime against the United States under Section 1 of an Act of Congress dated July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," in that:

(a) It appears in the said count that the prices paid by the consumers of fluid milk in the City of Chicago were fixed and determined as the result of a lawful act of others than these defendants entirely independent of the alleged conspiracy so to fix said prices complained of in said count.

(b) The said count contains allegations repugnant one to the other, certain of which allegations are entirely consistent with the innocence of these defendants of the alleged crime sought to be charged in said count.

30 (c) It affirmatively appears from the allegations of said count that interstate trade or commerce, if any, in fluid milk had ceased and terminated prior to the alleged performance of the matters and things complained of in said count.



8. Count 3 of the indictment does not state facts sufficient to constitute a crime against the United States under Section 1 of An Act of Congress dated July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," in that:

(a) The count fails to set forth facts sufficient to show that the defendants combined and conspired to restrain trade or commerce among the several states.

(b) The count fails to set forth facts to show that the distribution of fluid milk by so-called independent distributors, or the distribution of milk to stores and by stores in the City of Chicago, constitute trade or commerce among the several states.

9. Count 4 of the indictment fails to state facts sufficient to constitute a crime against the United States under Section 1 of An Act of Congress dated July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," in that:

(a) The count fails to allege facts to demonstrate an unreasonable or direct restraint of trade or commerce among the several states.

(b) The count fails to allege means of accomplishing said combination which would render the same unlawful.

(c) The count alleges a restraint of the production of, rather than trade or commerce among the several states in, fluid milk.

(d) The count fails to allege facts to demonstrate any restraint of trade or commerce among the several states.

(e) The count fails to sufficiently define the means, i. e., the base surplus plan, alleged to have been adopted by the defendants for the purpose of restraining trade or commerce among the several states.

10. Because certain defects in said indictment are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, the defendants, Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi, and each of them, demands judgment dismissing and quashing the indictment and/or each and every count thereof, and discharging them and each of them from custody.

Yours, etc.,

Bowman Dairy Company; D. B. Peck; Francis H. Kullman, Jr.; M. J. Metzger; H. T. Adamson; J. F. Philippi; by (signed) Montgomery, Hart, Pritchard, & Herriott, Attorneys for said Defendants, 120 South LaSalle Street, Chicago, Illinois. (Signed) Louis E. Hart, (signed) Irving Herriott, (signed) L. Edward Hart, Jr., Attorneys for said Defendants.

To Messrs. WILLIAM J. CAMPBELL, *United States Attorney*,  
LEO F. TIFNEY, *Special Assistant Attorney General*.

[Title omitted.]

*Joint and several demurrer of the defendants, The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth, to the indictment and motion of said defendants, and each of them, to quash said indictment*

Filed January 7, 1939.

Now come the defendants, The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth, and also come each of said defendants severally, by Frederic Burnham, Donald F. McPherson, and Cecil I. Crouse, their attorneys, and having read the indictment herein say that said indictment and each count thereof, and the matters therein contained, in manner and form as the same are therein alleged and set forth, are insufficient in law to require these defendants, or any or either of them, to plead to said indictment or any count thereof, or to answer the same, and that said indictment, and each count thereof, are insufficient in law to sustain a judgment against these defendants or any of them; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, demur to said  
33 indictment and each count thereof and move to quash the same upon the following grounds:

1. Said indictment, and each count thereof, do not aver or set forth any facts or allege or charge the commission of any acts by the defendants, or any or either of them, constituting an offense against the United States of America.

2. Said indictment, and each count thereof, in purporting to allege an offense against the United States of America, fail to do so with the certainty required by law, but on the contrary are vague, indefinite and uncertain to such an extent that these defendants, and each of them, are not advised thereby of the nature of the charges against them, and each of them, so that they, and each of them, may properly prepare and submit their several defenses.

3. Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," has been so amended, altered, modified, and restricted by various acts of Congress, including, among others, the Act of Congress of February 18, 1922, entitled, "An Act to Authorize Association of Producers of Agricultural Products," as to deny to defendants due process of law and equal protection of the laws in contravention of the Fifth Amendment of the Constitution of the United States of America, that is to say,

(a) Said Act of July 2, 1890, as amended, altered, modified, and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and other persons, including these defendants, and other associations, with respect to the definition, prohibition, and punishment of monopolies and restraints of trade in interstate trade and commerce.

(b) Said Act of July 2, 1890, so modified, amended, qualified, and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and all other persons, including these defendants, and other associations, by legalizing certain monopolies and restraints of interstate trade and commerce by such producers which are forbidden if intended or accomplished by others.

4. The indictment is void in that it was found and returned, without authority of law, at the October Term of this Court in the year 1938, by a Grand Jury impaneled and sworn at the July Term of said Court in the year 1938 and illegally sitting during said October Term, that is to say,

(a) The orders of August 31, 1938, and September 27, 1938, authorizing the Grand Jury to sit, respectively, during the September and October 1938 Terms of the District Court, do not find or disclose that this indictment was the result of an investigation begun but not finished during said July Term, or that any investigation was begun but not finished during said July 1938 Term of this Court.

(b) The indictment does not show that the investigations alleged to have been begun but not finished during the July 1938 Term were not completed in the September 1938 Term.

(c) It does not appear from said orders of August 31, 1938, and September 27, 1938, that said July 1938 Grand Jury was continued during the September 1938 and October 1938 Terms solely to finish investigations begun but not finished by it, and therefore said orders are void.

(d) Said Grand Jury had no power to request that it be continued during a term beyond the September 1938 Term of this Court, and the order of September 27, 1938, purporting to continue said Grand Jury during the October 1938 Term on its request is void, since it appears from the records that an order had been previously entered on August 31, 1938, continuing said Grand Jury on its request during the September 1938 Term.

5. None of the counts of said indictment states facts showing that these defendants or any or either of them have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say:

(a) The first paragraph of each count, which undertakes to describe the supposed combination and conspiracy therein alleged, does not state facts showing that the matters and things therein complained of are or were an undue or unreasonable restraint of interstate trade and commerce.

(b) The means by which said supposed combinations and conspiracies were intended to be effected are not stated in said indictment or in any count thereof.

(c) It does not appear from the allegations of said counts or of any of them that the objects or purposes of said supposed combinations and conspiracies or of any of them were intended to be accomplished by any means which would effect an undue or unreasonable restraint of interstate trade or commerce.

6. Each count of the indictment is fatally duplicitous in that each count joins several separate, independent, disconnected and unrelated alleged conspiracies.

7. The allegations of Count Two of said indictment do not show that these defendants, or any of them, have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say:

(a) It affirmatively appears from the allegations of said count that interstate trade or commerce, if any, in fluid milk had ceased and terminated prior to the alleged performance of the matters and things complained of in said count.

37 (b) It is not shown by the allegations of said Count that the alleged acts of these defendants therein complained of, restrain or restrained interstate commerce.

(c) It appears by the allegations of said count that the prices paid by consumers of fluid milk in the City of Chicago were fixed and determined by and as the result of the lawful acts of others than these defendants, and entirely independent of the alleged conspiracy to fix said prices complained of in said count.

8. The allegations of Count Three of said indictment are insufficient to give this Court jurisdiction over the matters and things therein set forth, and wholly fail to state an offense against the United States of America, that is to say:

(a) It is not shown by the allegations of said count that the alleged acts of the defendants, therein complained of, restrain or restrained interstate trade or commerce.

(b) It does not appear that the business of distributing fluid milk in the City of Chicago, alleged to have been hindered and prevented, involved interstate trade and commerce.

9. The allegations of Count Four of said indictment do not show that these defendants or any of them have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say:

38 (a) It appears from said allegations that the object and effect of the said supposed combination and conspiracy therein alleged was the adoption of the base-surplus plan, and it does not appear that the base-surplus plan is or was an unlawful or unreasonable restraint of trade or commerce.

(b) It appears from the allegations of the indictment that the alleged restraint and control complained of in Count Four was and



is restraint and control of production and not restraint or control of the commerce among the several states.

(c) It does not appear by the allegations of said count that the base-surplus plan limits or restrains either the production of milk or trade and commerce in-milk.

10. For a separate ground of demurrer of the defendant, W: A. Wentworth, said defendant shows the Court that the allegations of the indictment, and of each count thereof, are insufficient to show that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, in that it appears by said allegations that said defendant did nothing other than to arbitrate, with other arbitrators, certain disputes concerning the price provisions of contracts legally entered into between the Pure Milk Association and certain distributors of fluid milk.

39 11. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, the defendants, and each of them, pray judgment that this demurrer be sustained as to them, and each of them; that said indictment, and each count thereof, be quashed and that they, and each of them, be dismissed and discharge of this indictment by the Court.

The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth, Defendants; by (signed) Frederic Burnham, (signed) Donald F. McPherson, (signed) Cecil I. Crouse, Their Attorneys. Sidley, McPherson, Austin & Burgess, Mayer, Meyer, Austrian & Platt.

40

In United States District Court

[Title omitted.]

*Motion to quash service of summons upon a purported corporation, Borden-Wieland, Inc., named as a defendant herein.*

Filed January 7, 1939

R. W. Nessler, the person upon whom, as purported Assistant Secretary of a purported corporation, Borden-Wieland, Inc., named as a defendant herein, service of summons herein was purportedly made, comes now, specially appearing in this behalf, by Frederic Burnham, Donald F. McPherson, and Cecil I. Crouse, who appear specially as his attorneys in this behalf, and suggests to the Court that said purported corporation, Borden-Wieland, Inc., named as a defendant herein, no longer has any corporate existence and has had no corporate existence since January 4, 1936; and said R. W. Nessler moves

the Court to quash the service of summons purportedly made upon him as such purported Assistant Secretary of said purported corporation, Borden-Wieland, Inc., and to dismiss or drop from the case said purported defendant, Borden-Wieland, Inc.; and in support of said motion presents herewith and attaches hereto his affidavit.

R. W. NESSLER,

*Appearing Specially Herein.*

By FREDERIC BURNHAM,

DONALD F. MCPHERSON,

CECIL I. CROUSE,

*Specially Appearing in This Behalf.*

41

*Affidavit*

STATE OF ILLINOIS,

*County of Cook, ss:*

R. W. Nessler, being first duly sworn on oath, deposes and says that although he is one of the defendants in the above-entitled cause, he is not now appearing in that capacity but is appearing specially in connection with the motion to which this affidavit is attached; that there was at one time a corporation known as Borden-Wieland, Inc., which said corporation was organized and existing under and by virtue of the laws of the State of Delaware; that he is informed and believes, and so states the fact to be, that on, to wit, January 4, 1936, said corporation, Borden-Wieland, Inc., together with other corporations, was merged into a corporation known as Borden's Dairy Products Company, Inc., and thus lost its corporate identity; that thereafter, all of the assets of said Borden's Dairy Products Company, Inc., were transferred to The Borden Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey; that thereafter on, to wit, February 11, 1936, the aforesaid Borden's Dairy Products Company, Inc., was dissolved, thus the corporation with which Borden-Wieland, Inc., had become merged, as aforesaid, lost its corporate identity; that since the aforesaid transfer of said assets of Borden's Dairy Products Company, Inc., to The Borden Company, The Borden Company has used the name "Borden-Wieland" as a name indicating one of the divisions of The Borden Company, but that there is no longer in existence any such corporation as Borden-Wieland, Inc.

Affiant further states that on, to wit, the 26th day of November, 1938, he was served with a summons as purported Assistant Secretary of Borden-Wieland, Inc.; that during the corporate existence of said Borden-Wieland, Inc., he was Assistant Secretary of said then Corporation, but that upon its merger, as aforesaid, his official connection with said Company ceased ipso facto.

Further affiant saith not.

R. W. NESSLER.

Subscribed and sworn to before me this 12th day of December 1938.

[SEAL]

ELIZABETH M. RICHARDSON,

*Notary Public.*

[Title omitted.]

*Notice*

To:

**WILLIAM J. CAMPBELL,**

*United States District Attorney,*

*8th Floor, United States Court House, Chicago.*

**LEO F. TIERNEY,**

*Special Assistant to the Attorney General,*

*Room 667, 208 South La Salle Street, Chicago.*

Please take notice that we are this day filing in the office of the Clerk of the District Court of the United States the motion to quash and demurrer of Hunding Dairy Company, a corporation, and Carl W. Hunding, defendants in the above-entitled cause, a copy of which is herewith served upon you.

(Signed) **CHARLES S. DENEEN,**

(Signed) **ROY MASSENA,**

(Signed) **DONALD N. SCHAFER,**

*Attorneys for said Defendants.*

Received a copy of the above Notice and a copy of the document therein referred to this 7th day of January A. D. 1939.

(Signed) **LEO F. TIERNEY. (D. & B.)**

(Signed) **WILLIAM J. CAMPBELL.**

[Title omitted.]

*Motion of the Defendants Hunding Dairy Company, a corporation, and Carl W. Hunding, to quash the indictment herein, and demurrer of said defendants thereto*

Filed January 7, 1939

Now come the Hunding Dairy Company, a corporation, and Carl W. Hunding, two of the defendants herein, by Charles S. Deneen, Roy Massena, and Donald N. Schaffer, their attorneys, and jointly and severally move the Court to quash the indictment, and each and every count thereof, for the following reasons:

(1) A. The indictment is void in that it was returned at the October term of this Court, in the year 1938, by a Grand Jury impanelled and sworn at the July term of said court in the year 1938, and which said Grand Jury was sitting without authority of law during said October term, that is to say:

(a) Neither the order of September 27, 1938, purporting to authorize said Grand Jury to continue to sit, upon its own request, during the October term of said court, nor the indictment shows

that the investigation of the matters charged in this indictment had not been finished prior to the commencement of said October term, in the year 1938, of this Court;

44 (b) The orders of August 31, 1938, and September 27, 1938, purporting to authorize said Grand Jury to continue to sit respectively during the September and October 1938 terms of this Court, do not set forth or disclose that an investigation of the matters charged in this indictment was begun but not finished during said July term or that any investigation was begun but not finished during either said July term or said September term, in the year 1938, of this Court;

(c) There was no warrant or authority in law for the entry of an order authorizing said Grand Jury upon its own request to continue to sit during the October term, in the year 1938, of this Court, said Grand Jury having upon its own request been authorized to continue to sit during the September term, in the year 1938, of this Court.

(2) B. The indictment, and each count thereof, is insufficient in law to constitute an offense against the laws of the United States, and does not show that these defendants, or either of them, conspired or combined to restrain trade or commerce among the several states of the United States, that is to say:

(a) The matters and things therein alleged to constitute an unlawful conspiracy beginning in the month of January 1935 were lawful under the laws of the United States as administered by the Executive, as more fully appears from a certain "License for Milk—Chicago Sales Area," issued under date of February 3, 1934, by the

45 Secretary of Agriculture of the United States, acting under the authority in him vested by the Act of Congress, approved May 12, 1933, entitled "Agricultural Adjustment Act," and, which said license, as amended from time to time thereafter, was in full force and effect until March 2, 1935.

And said defendants further say that the indictment herein, and each and every count thereof, is not sufficient in law to require these defendants, or either of them, to plead thereto, and these defendants jointly and severally demur to the indictment, and each and every count thereof, for the following reasons:

1. Said indictment, and each count thereof, does not aver or set forth facts sufficient to constitute an offense against the laws of the United States.

2. Said indictment, and each count thereof, in purporting to allege an offense against the laws of the United States is not sufficiently definite or certain as fully to inform these defendants, and each of them, as to the nature and cause of the accusations against them, but said indictment, and each of the counts thereof, is vague, indefinite, and uncertain to the extent that these defendants, and each of them, are not advised thereby of the charges against them, and each of them, so as to enable them to prepare their several defenses thereto.



3. The indictment, and each count thereof, does not state facts showing that these defendants, and each of them, have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say:

46. (a) The respective paragraphs of each count of said indictment which undertake to describe the supposed combination and conspiracy therein alleged do not state facts showing that the matters and things therein complained of are or were or constituted an undue or unreasonable restraint of trade or commerce among the several states of the United States;

(b) That the allegations of said counts, and each of them, as to the means and methods by which said supposed combinations or conspiracies were intended to be effected, do not set forth facts showing that any of such means would effect an undue or unreasonable restraint of trade or commerce among the several states of the United States.

4. Count Two of said indictment is insufficient and wholly fails to state facts sufficient to constitute an offense against the laws of the United States, that is to say:

(a) Said count fails to set forth facts showing the alleged acts of the defendants therein complained of were in restraint of trade and commerce among the several states of the United States;

(b) Said count does not set forth facts showing that the distribution of fluid milk in the City of Chicago involved trade or commerce among the several states of the United States.

5. Count Three of said indictment is insufficient and wholly fails to state facts sufficient to constitute an offense under the laws of the United States, that is to say:

47. (a) Said count fails to set forth facts showing that the alleged acts of the defendants therein complained of were in restraint of trade and commerce among the several states of the United States;

(b) Said count does not set forth facts showing that the distribution of fluid milk in the City of Chicago therein alleged to have been hindered or prevented involved trade or commerce among the several states of the United States.

6. Count Four of said indictment is insufficient and wholly fails to state facts sufficient to constitute an offense under the laws of the United States, that is to say:

(a) The allegations of said Count Four set forth that the supposed conspiracy and combination therein alleged was intended to be effected by the adoption of the base-surplus plan of payment, but said count fails to set forth facts showing that said base-surplus plan of production or payment is or was an unreasonable restraint of trade or commerce among the several states of the United States or in what manner said base-surplus plan was unlawful;

(b) Said Count Four sets forth facts showing that the supposed restraint and obstruction therein alleged was a restraint, if any, of

production and not a restraint of trade or commerce among the several states of the United States;

(c) The allegations of said Count Four do not set forth facts from which the Court can determine that the base-surplus plan restricts, limits, restrains, or obstructs either the production of milk or trade and commerce in fluid milk among the several states of the United States.

48 7. Said indictment, and each count thereof, purporting to charge an offense under Section 1 of the Act of Congress approved July 2, 1890, entitled "An Act to Protect trade and commerce against unlawful restraints and monopolies" is void for the reason that, said Act of July 2, 1890, has been so amended, altered, and modified by the Act of Congress approved February 18, 1922, entitled "An Act to Authorize Association of Producers of Agricultural Products" as to deny to these defendants due process of law in contravention of the Fifth Amendment of the Constitution of the United States and of other constitutional rights in that,

(a) Said Act of July 2, 1890, as amended, altered, and modified by said Act of February 18, 1922, arbitrarily, unfairly, and capriciously discriminates between certain producers and associations of producers of agricultural products and other persons, including these defendants, and other associations, with respect to the legality of combinations and agreements and the prohibition and punishment therefor of monopolies and restraints of trade and commerce among the several states of the United States;

(b) Said Act of February 18, 1922, legalizes certain combinations and agreements in restraint of trade and commerce among the several states of the United States and tending to effect a monopoly thereof when made by certain producers and associations of producers of agricultural products, which said combinations and agreements are prohibited and punished if attempted or undertaken by other persons.

49 8. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are insisted upon with like effect as if the same were herein specifically set forth.

Wherefore, these defendants, and each of them, pray judgment that this motion be sustained and that said indictment, and each count thereof, be quashed, and that these defendants, and each of them, be dismissed and discharged.

HUNDING DAIRY COMPANY,  
A Corporation,  
CARL W. HUNDING,  
Defendants.

By (Signed) CHARLES S. DENEEN,  
(Signed) ROY MASSENA,  
(Signed) DONALD N. SCHAFER,  
Their Attorneys.

46 UNITED STATES VS. THE BORDEN COMPANY ET AL.

50 In United States District Court

[Title omitted.]

*Notice*

To WILLIAM J. CAMPBELL, Esq.,  
*United States Attorney.*

LEO F. TIERNEY, Esq.,  
*Special Assistant to the Attorney General.*

Please take notice that I am this day, January 7, 1939, filing with the Clerk of the United States District Court the motion of defendants Capitol Dairy Company and Hyman I. Freed to quash the indictment herein, and the demurrer of said defendants to said indictment, a copy of which said motion and demurrer is herewith handed you.

(Stamped) ISIDORE FRIED,  
*Attorney for Defendants,*  
*Capitol Dairy Company and Hyman I. Freed.*

Received copy of the foregoing notice, together with copy of motion and demurrer therein mentioned, January 7, 1939.

(Signed) LEO F. TIERNEY.  
(D. B. BRITT).

(Signed) WILLIAM J. CAMPBELL.

51 In United States District Court

[Title omitted.]

*Motion of Defendants Capitol Dairy Company and Hyman I. Freed, and each of them, to quash the indictment herein, and demurrer of said defendants to said indictment*

Filed January 7, 1939

Now come the defendants, Capitol Dairy Company and Hyman I. Freed, and each of them, by Isidore Fried, their attorney, and jointly and severally move the Court to quash the indictment herein, and each and every count thereof, for the following reasons:

I

The indictment herein is void because it was returned during the October 1938 term of this Court by an illegal and invalid grand jury, which said grand jury then had no power to find or return said indictment, that is to say:

(a) Said grand jury was empaneled during the July 1938 term of this Court and had no power to find or return this indictment during the October 1938 term of this Court.

(b) Said grand jury had no power to continue to sit during the October 1938 term of this Court on its request, and the order of September 27, 1938, purporting to continue said grand jury during the October 1938 term on its request is void, it appearing from the records that an order had been previously entered on August 31, 1938, continuing said grand jury during the September 1938 term on its request.

(c) It does not appear from the order of August 31, 1938, purporting to continue said July 1938 grand jury during the September 1938 term that the investigation which resulted in this indictment was one of the investigations begun but not finished during the July 1938 term of this Court, nor does it appear from the order of September 27, 1938, purporting to continue said July 1938 grand jury during the October 1938 term, nor from the indictment herein, that the investigation which resulted in this indictment was one of the investigations begun and not already finished by said grand jury.

(d) It does not appear from said orders of August 31, 1938, and September 27, 1938, that said July 1938 grand jury was continued during the September 1938 and October 1938 terms solely to finish investigations begun but not finished by it, and therefore said orders are void.

## II

And said defendants further say that said indictment and each count thereof and the matters therein contained are insufficient in law to require these defendants or either of them to plead to said indictment or any count thereof, or to answer the same, and that said indictment and each count thereof are insufficient in law to warrant the rendition of a judgment against these defendants or either of them, and these defendants demur to said indictment and each count thereof and move to quash the same upon the following grounds:

1. Said indictment, and each count thereof, does not aver or set forth any facts or allege or charge the commission of any acts by the defendants, or either of them, constituting an offense against the United States of America.

2. Said indictment, and each count thereof, in purporting to allege an offense against the United States of America, fails to do so with the certainty required by law, but on the contrary is vague, indefinite and uncertain to such an extent that these defendants, and each of them, are not advised thereby of the nature of the charges against them, and each of them, so that they, and each of them, may properly prepare and submit their several defenses.

3. Said indictment and each count thereof is void for the reason that Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," has been so amended, altered, modified, and re-



stricted by various Acts of Congress, including, among others, the Act of Congress of February 18, 1922, entitled "An Act to Authorize Association of Producers of Agricultural Products," as to deny to defendants due process of law and equal protection of the laws in contravention of the Fifth Amendment of the Constitution of the United States of America, in that—

(a) Said Act of July 2, 1899, as amended, altered, modified, and restricted by said Act of February 18, 1922, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and other persons, including these defendants, and other associations, with respect to the definition, prohibition, and punishment of monopolies and restraints of trade in interstate trade and commerce.

(b) Said Act of July 2, 1890, as modified, amended, qualified, and restricted by said Act of February 18, 1922, unreasonably discriminates between certain producers and associations of producers of agricultural products and all other persons; including these defendants, and other associations, by legalizing certain monopolies and restraints of interstate trade and commerce by such producers which are forbidden if intended or accomplished by others.

4. None of the counts of said indictment state facts showing that these defendants or any or either of them have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say—

(a) The first paragraph of each count, which undertakes to describe the supposed combination and conspiracy therein alleged, does not state facts showing that the matters and things therein complained of are or were an undue or unreasonable restraint of interstate trade and commerce.

(b) The means by which said supposed combinations and conspiracies were intended to be effected are not stated in said indictment or in any count thereof.

(c) It does not appear from the allegations of said counts or any of them that the objects or purposes of said supposed combinations and conspiracies or of any of them were intended to be accomplished by any means which would effect an undue or unreasonable restraint of interstate trade or commerce.

55 5. The indictment and each count thereof is not sufficient in law to constitute an offense against the laws of the United States and does not show that these defendants combined and conspired to restrain trade or commerce among the several states of the United States, that is to say,

(a) The matters and things therein alleged to constitute a conspiracy in restraint of trade and commerce among the several states of the United States beginning in the month of January 1935, were lawful under the laws of the United States as more fully appears from a certain "License for Milk—Chicago Sales Area" issued by the Secretary of Agriculture of the United States acting under the

authority in him vested by the Act of Congress approved May 12, 1933, entitled "Agricultural Adjustment Act," which said license was issued by said Secretary of Agriculture under date of February 3, 1934, and, as amended from time to time thereafter, was in full force and effect until March 2, 1935.

6. The allegations of Count Two of said indictment are insufficient to give this Court jurisdiction over the matters and things therein set forth, and wholly fail to state an offense against the United States of America, that is to say,

(a) Said count fails to show that the matters and things therein complained of are or were a restraint of interstate trade and commerce or an undue or unreasonable restraint of interstate trade and commerce.

(b) Said count fails to show that the distribution of fluid milk in the City of Chicago involved trade or commerce among the several states of the United States.

7. The allegations of Count Three of said indictment are not sufficient to give this Court jurisdiction over the matters and things therein set forth, and wholly fail to state an offense against the United States of America, that is to say,

(a) The allegations of said count do not show that the alleged acts of the defendants, therein complained of, were in restraint of interstate trade or commerce.

(b) The allegations of said count fail to show that the distribution of fluid milk in the City of Chicago, alleged to have been hindered and prevented, involved interstate trade and commerce.

8. Count Four of said indictment is insufficient and fails to show that these defendants or any of them have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say,

(a) It appears from said allegations that the object and effect of the said supposed combination and conspiracy therein alleged was intended to be effected by the adoption of the base-surplus plan, but it does not appear that the base-surplus plan is or was an unlawful or unreasonable restraint of trade or commerce.

(b) It appears from said allegations that the alleged restraint and control complained of was and is restraint and control of production and not restraint or control of trade or commerce among the several states.

(c) It does not appear from said allegations that the base-surplus plan complained of limits or restrains either the production of milk or trade and commerce in milk.

9. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, said defendants and each of them pray that this demurrer be sustained as to them, and each of them; that said indict-

ment and each count thereof be quashed and that they and each of them be dismissed and discharged of this indictment by the Court.

CAPITOL DAIRY COMPANY,  
HYMAN I. FREED,  
*Defendants.*

(Stamped) ISIDORE FRIED,  
*By their attorney.*

(Stamped) ISIDORE FRIED,  
*Attorney for said Defendants.*

58 In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant International Dairy Company,  
a corporation*

Filed January 7, 1939

The defendant, International Dairy Company, a corporation, by Loy N. McIntosh, David B. Gann, Frederick Secord, and J. Walter Stead, its attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for it to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

59 4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but, is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect it with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged  
60 conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against it.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) LOY N. McINTOSH,

(Signed) DAVID B. GANN,

(Signed) FREDERICK SECORD,

(Signed) J. WALTER STEAD,

*Attorneys for said defendant.*

61 In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, Gordon B. Wanzer*

Filed January 7, 1939

The defendant, Gordon B. Wanzer, by Loy N. McIntosh, David B. Gann, Frederick Secord, and J. Walter Stead, his attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for him to plead unto, for the following reasons:



1: The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

62 4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other codefendants named therein to connect him with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged

63 conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against him.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

LOY N. MCINTOSH,  
DAVID B. GANN,  
FREDERICK SECORD,  
J. WALTER STEAD,  
*Attorneys for said defendant.*

64 In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant H. Stanley Wanzer*

Filed January 7, 1939

The defendant, H. Stanley Wanzer, by Loy N. McIntosh, David B. Gann, Frederick Secord, and J. Walter Stead, his attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for him to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

65 4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the

Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other codefendants named therein to connect him with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several  
66 separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against him.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

LOY N. McINTOSH,  
DAVID B. GANN,  
FREDERICK SECORD,  
J. WALTER STEAD,

*Attorneys for said defendant.*

67 In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, Sidney Wanzer & Sons, Inc.,  
a corporation*

Filed January 7, 1939

The defendant, Sidney Wanzer & Sons, Inc., a corporation, by Loy N. McIntosh, David B. Genn, Frederick Secord, and J. Walter Stead, its attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for it to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

68 4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof relates to a subject matter that is not justifiable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other codefendants named therein to connect it with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.



9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against it.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) LOY N. McINTOSH,

(Signed) DAVID B. GANN,

(Signed) J. WALTER STEAD,

(Signed) FREDERICK SECORD,

*Attorneys for said defendant.*

70

In United States District Court

[Title omitted.]

*Demurrer to Indictment of Defendant, Louis Janata*

Filed January 7, 1939

The defendant, Louis Janata, by Loy N. McIntosh, David B. Gann, Frederick Secord, and J. Walter Stead, his attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for him to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

71 4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect him with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged  
72 conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against him.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) LOY N. McINTOSH,

(Signed) DAVID B. GANN,

(Signed) FREDERICK SECORD,

(Signed) J. WALTER STEAD,

*Attorneys for said defendant.*

[Title omitted.]

*Demurrer to indictment of defendant, Western United Dairy Co., a corporation*

Filed January 7, 1939

The defendant, Western United Dairy Co., a corporation, by Edward H. Murnane and James A. Harrington, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for it to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

74 4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect it with the alleged conspiracy.

- 75 8. The indictment, and each count thereof, is fatally dupli-  
cious.
9. The indictment, in each count thereof, joins several separate, in-  
dependent, disconnected, unrelated, and subordinate alleged conspira-  
cies.
10. There is a misjoinder of counts.
11. The indictment, and each count thereof, is vague, indefinite,  
uncertain, ambiguous; and the allegations are not direct, certain, and  
positive, but are set up by way of conclusions, argumentative infer-  
ences, and epithets.
12. The allegations of the indictment, and each count thereof, are  
inconsistent with and repugnant to each other.
13. The allegations of the indictment, and each count thereof, are  
so vague, indefinite, and uncertain as to fail to apprise this defendant  
of the nature of the charge against it.
14. The indictment, and each count thereof, is barred by the statute  
of limitations.
15. By the presentation of specific objections, this defendant does  
not intend to waive the general objections herein contained, or any  
other objections not herein enumerated, to any count or counts of said  
indictment.

(Signed) EDWARD H. MURNANE,  
(Signed) JAMES A. HARRINGTON,  
*Attorneys for said defendant.*

76 In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, Western Dairy Company, Inc.,  
a corporation*

Filed January 7, 1939

The defendant, Western Dairy Company, Inc., a corporation, by  
Edward H. Murnane and James A. Harrington, its attorneys, comes  
and demurs to the said indictment and each count thereof, and says  
that the same is not sufficient in law for it to plead unto, for the follow-  
ing reasons:

1. The indictment, and each count thereof, fails to state facts show-  
ing the commission of any offense over which this court has jurisdic-  
tion.
2. The indictment, and each count thereof, fails to state facts show-  
ing an unlawful combination and conspiracy in restraint of trade and  
commerce in fluid milk among the said several states of the United  
States, in violation of section 1 of the Act of Congress of July 2, 1890,  
entitled "An Act to protect trade and commerce against unlawful  
restraints and monopolies."
- 77 3. The alleged conspiracy set forth in each count of the  
indictment does not show facts sufficient to bring it within  
the purview of any statute of the United States of America.



4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other codefendants named therein to connect it with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against it.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) EDWARD H. MURNANE,

(Signed) JAMES A. HARRINGTON,

Attorneys for said defendant.

In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, United Dairy Company,  
a corporation*

Filed January 7, 1939

The defendant, *United Dairy Company*, a corporation, by Edward H. Murnane and James A. Harrington, its attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for it to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect it with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against it.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) EDWARD H. MURNANE,

(Signed) JAMES A. HARRINGTON,  
*Attorneys for said defendant.*

84. In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, Louis G. Glick*

Filed January 7, 1939

The defendant, Louis G. Glick, by Edward H. Murnane and James A. Harrington, his attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for him to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

86 7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect him with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against him.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant  
87 does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) EDWARD H. MURNANE,

(Signed) JAMES A. HARRINGTON,

Attorneys for said defendant.



[Title omitted.]

*Demurrer to indictment of defendant, Maurice S. Dick*

Filed January 7, 1939

The defendant, Maurice S. Dick, by Edward H. Murnane and James A. Harrington, his attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for him to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect him with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.  
9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against him.

14. The indictment, and each count thereof, is barred by the statute of limitations.

91 15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) EDWARD H. MURNANE,

(Signed) JAMES A. HARRINGTON,

*Attorneys for said defendant.*

92 In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, Samuel S. Dick*

Filed January 7, 1939

The defendant, Samuel S. Dick, by Edward H. Murnane and James A. Harrington, his attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for him to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

- 93 4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.
5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court, in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.
6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.
7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect him with the alleged conspiracy.
- 94 8. The indictment, and each count thereof, is fatally duplicitous.
9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.
10. There is a misjoinder of counts.
11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.
12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.
13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against him.
14. The indictment, and each count thereof, is barred by the statute of limitations.
15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained; or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) EDWARD H. MURNANE,

(Signed) JAMES A. HARRINGTON,

Attorneys for said defendant.

[Title omitted.]

*Demurrer to indictment of defendant, Milk Dealers' Bottle Exchange, a corporation*

Filed January 7, 1939

The defendant, Milk Dealers' Bottle Exchange, a corporation, by Loy N. McIntosh, David B. Gann, Frederick Secord, and J. Walter Stead, its attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for it to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

4. The alleged conspiracy set forth in the indictment and each count thereof relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment, and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other codefendants named therein to connect it with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.



9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated and subordinate alleged conspiracies.

97 10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against it.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) LOY N. MCINTOSH,

(Signed) DAVID B. GANN,

(Signed) FREDERICK SECORD,

(Signed) J. WALTER STEAD.

Attorneys for Said Defendant.

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In United States District Court

[Title omitted.]

*Joint and several demurrer of the defendants, Associated Milk Dealers, Inc., Paul Potter, and Otto Black, to the indictment, and motion of said defendants, and each of them, to quash said indictment*

(Filed January 7, 1939)

Now come the defendants, Associated Milk Dealers, Inc., a corporation, Paul Potter, and Otto Black, and also come each of said defendants severally, by Russell J. McCaughey and Fred C. Nonnamaker, Jr., their attorneys, and having read the indictment herein say that said indictment, and each count thereof, separately and severally, and the matters therein contained, in manner and form as the same are therein alleged and set forth, are insufficient in law to require these defendants, or any or either of them, to plead to said indictment or any count thereof, or to answer the same, and that said indictment, and each count thereof, are insufficient in law to sustain a judgment against these defendants or any of them; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, demur to said indictment and each count thereof and move to quash the same upon the following grounds:

1. Said indictment, and each count thereof, does not aver or set forth any facts or allege or charge the commission of any acts by the defendants, or any or either of them, constituting an offense against the United States of America.

99 2. Said indictment, and each count thereof, in purporting to allege an offense against the United States of America, fails to do so with the certainty required by law, but on the contrary are vague, indefinite, and uncertain to such an extent that these defendants, and each of them, are not advised thereby of the nature of the charges against them, and each of them, so that they, and each of them, may properly prepare and submit their several defenses, and each avail himself or itself of his or its conviction or acquittal for protection against a further prosecution for the same cause.

3. Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," has been so amended, altered, modified and restricted by the Act of Congress of February 18, 1922, entitled, "An Act to Authorize Association of Producers of Agricultural Products," as to deny to defendants due process of law and equal protection of the laws in contravention of the Fifth Amendment of the Constitution of the United States of America, that is to say:

(a) Said Act of July 2, 1890, as amended, altered, modified and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and other persons, including these defendants, and other associations, with respect to the definition, prohibition, and punishment of monopolies and restraints of trade in interstate trade and commerce.

100 (b) Said Act of July 2, 1890, so modified, amended, qualified, and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and all other persons, including these defendants, and other associations, by legalizing certain monopolies and restraints of interstate trade and commerce by such producers which are forbidden if intended or accomplished by others.

4. The indictment is void in that it was returned, without authority of law, at the October Term of this Court in the year 1938, by a Grand Jury impaneled and sworn at the July Term of said Court in the year 1938 and illegally sitting during said October Term, that is to say:

(a) The orders of August 31, 1938, and September 27, 1938, authorizing the Grand Jury to sit, respectively, during the September and October 1938 terms of the District Court, do not find or disclose that this indictment was the result of an investigation begun but not finished during said July Term, or that any investigation was begun but not finished during said July 1938 Term of this Court.

(b) The indictment does not show that the investigations alleged to have been begun but not finished during the July 1938 Term were not completed in the September 1938 Term.

5. None of the counts of said indictment states facts showing that these defendants, or any or either of them, have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say:

101 (a) The first paragraph of each count, which undertakes to describe the supposed combination and conspiracy therein alleged, does not state facts showing that the matters and things therein complained of are or were an undue or unreasonable restraint of interstate trade and commerce.

(b) The means by which said supposed combinations and conspiracies were intended to be effected are not stated in said indictment or in any count thereof.

(c) It does not appear from the allegations of said counts or of any of them that the objects of purposes of said supposed combinations and conspiracies or of any of them were intended to be accomplished by any means which would effect an undue or unreasonable restraint of interstate trade or commerce.

6. The allegations of Count One are insufficient to show that these defendants, or any or either of them, engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States in that

(a) It is alleged that some of the officers and directors of the Associated Milk Dealers, Inc., were also officers of some of the major distributors, but it is not alleged that said directors constituted a majority of the Board of Directors of said Associated Milk Dealers, or that said officers were empowered or authorized by said Board of Directors of Associated Milk Dealers to do or perform any of the acts complained of;

102 (b) It is alleged that the Associated Milk Dealers, Inc., was nothing more than an agency through which the major distributors acted as a unit in an arbitration of certain disputes concerning price provisions of contracts legally entered into between Pure Milk Association and certain distributors; and

(c) That certain officers of Associated Milk Dealers, Inc., met jointly with others to negotiate price provisions of contracts legally entered into with Pure Milk Association, but it is not alleged that such officers were duly authorized to act for the association.

7. The allegations of Count Two of said indictment are insufficient to give this court jurisdiction over the matters and things therein set forth with respect to these defendants and wholly fails to state an offense by these defendants against the United States of America, that is to say;

(a) It affirmatively appears from the allegations of said count that interstate trade or commerce, if any, in fluid milk had ceased and terminated prior to the alleged performance of acts by these defendants;

(b) It is not shown by the allegations of said count that the alleged acts of these defendants, therein complained of, restrain or restrained interstate trade or commerce;

(c) It does not appear that the business of resale to Illinois purchasers of fluid milk shipped from outside the State of Illinois after processing and commingling in Illinois with Milk produced in Illinois involves interstate trade and commerce, and the acts alleged to have been performed by these defendants relate only to matters pertaining to such resale;

103 (d) It does not appear from said count that the acts of these defendants alleged relate in any manner to the conspiracy charged or in any manner furthered such conspiracy.

8. The allegations of Count Three of said indictment are insufficient to give this court jurisdiction over the matters and things therein set forth and wholly fail to state an offense against the United States of America, that is to say:

(a) It is not shown by the allegations of said count that the alleged acts of the defendants, therein complained of, restrain or restrained interstate trade or commerce;

(b) It does not appear that the business of distributing fluid milk in the City of Chicago, alleged to have been hindered and prevented, involved interstate trade and commerce;

(c) The overt act alleged to have been performed by these defendants is not shown to relate in any manner to the conspiracy charged or to in any manner further such conspiracy.

9. The allegations of Count Four of said indictment do not show that these defendants or any of them have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say:

(a) It appears from said allegations that the object and effect of the said supposed combination and conspiracy therein alleged was the adoption of the base-surplus plan, and it does not appear that the base-surplus plan is or was an unlawful or unreasonable restraint of trade or commerce;

104 (b) It appears from the allegations of the indictment that the alleged restraint and control complained of in Count Four was and is restraint and control of production and not restraint or control of the commerce among the several states;

(c) It does not appear by the allegations of said count that the base-surplus plan limits or restrains either the production of milk or trade and commerce in milk.

10. The indictment fails to allege sufficient acts and intents on the part of these defendants with reasonable particularity of time and place and circumstance to charge these defendants with a crime.

11. It does not appear from any count in said indictment that the acts charged against these defendants, if proved, will support a conviction.

12. The entire substance of the acts charged against these defendants is as consistent with the hypothesis of innocence as with that of guilt, and the indictment in each and every count thereof, severally and separately considered, fails to allege an offense.



13. The indictment in each and every count thereof fails to inform these defendants of the nature and cause of the accusation as required under Amendment VI of the United States Constitution.

14. The alleged conspiracy set forth in the indictment and each count thereof relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1

105 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

15. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commended to be done by the United States of America.

16. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other codefendants named therein to connect it with the alleged conspiracy.

17. The averments of the acts of these defendants do not make clear that such acts had some relation to the conspiracy.

18. The indictment, and each count thereof, is fatally duplicitous.

19. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

20. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, the defendants, and each of them, pray judgment that this demurrer be sustained as to them, and each of them; that 106 said indictment, and each count thereof, be quashed and that they, and each of them, be dismissed and discharged of this indictment by the Court.

ASSOCIATED MILK DEALERS, INC.,  
A Corporation,  
PAUL POTTER, and OTTO BLACK,  
Defendants.

By (Signed) RUSSELL J. MCCAUGHEY,  
(Signed) FRED C. NONNAMAKER, JR.,  
Their Attorneys.

(Signed) RUSSELL J. MCCAUGHEY,  
(Signed) FRED C. NONNAMAKER, JR.,  
Attorneys for said Defendants.

To Messrs. WILLIAM J. CAMPBELL, United States Attorney,  
LEO J. TIERNEY, Special Assistant Attorney General.

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## In United States District Court

[Title omitted.]

*Demurrer of defendants, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred Dahms, F. Ray Bryant, John O'Connor, and David A. Riskind*

Filed January 7, 1939

The defendants, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred Dahms, F. Ray Bryant, John O'Connor, and David A. Riskind, jointly, severally, and jointly and severally, by their attorney, Joseph A. Padway, demur to the indictment and to each and every of the separate counts of the indictment on the following grounds:

## I.

Count III of the indictment, especially Paragraph 76, is bad for duplicity and multifariousness in that said count charges several separate and independent alleged violations of Section 1 of the Sherman Anti-Trust Act, the which alleged violations are not related, and to each of which alleged violations the defendants, and each of them, would be required to offer separate and independent evidence; further, that the jury in arriving at a verdict under this count would be confused and misled because of the existence of the several separate and independent charges made therein, and the defendants and each of them would be prejudiced thereby.

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## II.

That the said indictment, and each and every of the four counts of the same, does not state facts sufficient to constitute a crime against the United States of America, because:

A. The facts alleged in Paragraph 39 of the indictment show that the Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America (referred to in the indictment as Local 753), being a voluntary unincorporated association of individuals is not under the law of the State of Illinois and of the United States of America a legal entity, and therefore has no legal capacity to be sued or to be indicted as a legal entity;

B. Under Section 17 of the Sherman Anti-Trust Act and under the various provisions of the Norris-LaGuardia Act, Local 753 is not subject to criminal prosecution for the acts alleged in the indictment; under Section 17 of the Sherman Anti-Trust Act and under the provisions of the Norris-LaGuardia Act, the officials or agents of Local 753 are not subject to criminal prosecution for the acts alleged in the indictment; that under said statutes the acts of these defendants as alleged in the indictment did not constitute a crime against the United States of America.

C. The allegations in Paragraphs 39, 40, 47, 48, 58, 59, 60, 63; and Paragraphs 64, 71, 72, 73; and Paragraphs 76, 77, 83, 84, 85, and Paragraphs 88, 89, 95, 96, and 97 are conclusions of law and conclusions of fact and are not allegations of definite facts; that the allegations in these paragraphs as to the alleged conspiracy and alleged overt acts by these defendants are so vague, indefinite and uncertain that the defendants and each and all of them are not informed of the nature and cause of accusation against them as

109 required by the provisions of the Sixth Amendment to the Constitution of the United States of America; and these allegations do not enable the defendants and each and all of them to make a proper defense to the indictment or plead their jeopardy in bar of a later prosecution for the same alleged offense.

D. That the facts alleged in the following paragraphs at places indicated show that there was no crime against the United States of America within the meaning of Section 1 of the Sherman Anti-Trust Act because such facts do not affect commerce within the meaning of said section for the reason that such facts indicate that the defendants' acts as charged in the indictment affected intrastate commerce and did not affect interstate commerce; this is shown specifically in the following paragraphs:

(1) Paragraph 24 referring to production of fluid milk and to distribution and sale of fluid milk in the City of Chicago;

(2) Paragraph 58 referring to distribution of fluid milk within Chicago, and referring to the denying of membership to duly qualified drivers in the employ of independents;

(3) Paragraph 59 referring to the counsel, advise and directing of Local 753;

(4) Paragraph 60 referring to counsel, advise and directing of Local 753 and referring to the protecting of officials, agents, and members of Local 753 from arrest and prosecution;

(5) Paragraph 63 referring to fixing and maintaining prices for the sale by distributors in Chicago of fluid milk shipped into Chicago from States outside of Illinois;

(6) Paragraph 71 referring to distribution of fluid milk within Chicago, and referring to the denying of membership to duly qualified drivers in the employ of independents, and referring to the compelling of independent distributors to sell fluid milk at noncompetitive prices;

(7) Paragraph 72 referring to the counsel, advise and directing of Local 753;

(8) Paragraph 73 referring to counsel, advise and directing of Local 753 and referring to the protecting of officials, agents, and members of Local 753 from arrest and prosecution;

110 (9) Paragraph 76 referring to the preventing of independent producer from engaging in the business of distributing fluid milk in Chicago and to hinder them from competing with the major distributors and to hinder and prevent distribution of fluid

milk to the stores and by stores in Chicago, and to prevent any distribution of fluid milk in Chicago except by the method and in the manner determined by the defendants.

(10) Paragraph 83 referring to the compelling and coercing of independent distributors to acquire the business of existing fluid milk distributors as a condition precedent to entering business of distributing milk in Chicago and referring to the compelling of independent distributors to observe certain unwritten rules with respect to distributing fluid milk and specifically the rule that required that not more than one distributor should serve any stop and no independent distributor should take stops away from major distributors, and referring to the refusal to enter into labor contracts with independent distributors unless they would observe such unwritten rules, and referring to the compelling of store proprietors to refrain from distributing fluid milk at said stores in Chicago, and referring to the compelling of independent vendor distributors to restrain from distributing fluid milk in Chicago; and referring to the picketing of stores distributing fluid milk and referring to the engaging in secondary boycotts, and referring to the threatening to injure and injuring persons, and referring to the threatening to and damaging and destroying of property, and referring to the attempting to and forcibly detaining employees of distributors and referring to the threatening to and calling of strikes of employees of distributors.

(11) Paragraph 84 referring to the counsel, advise, and directing of Local 753;

(12) Paragraph 85 referring to the counsel, advise, and directing of Local 753 and referring to the protecting of officials, agents, and members of Local 753 from arrest and prosecution;

(13) Paragraph 95 referring to the resort to threats because of violence or other coercive means against independent distributors who attempted to induce member producers to withdraw from and refuse to sell their milk through the Pure Milk Association, and referring to the denying of membership in Local 753 to duly qualified drivers in the employ of such independent distributors.

111 (14) Paragraph 96 referring to the counsel, advise, and directing of Local 753;

(15) Paragraph 97 referring to the counsel, advise, and directing of Local 753 and referring to the protecting of officials, agents, and members of Local 753 from arrest and prosecution;

### III

That the indictment and each and every count on their face show that it is subject to the defense of the statute of limitations (as found in 18 U. S. C. A., Section 582), in that under Paragraph 1 of the indictment, these defendants are charged with having committed certain alleged offenses beginning in the month of January, A. D. 1933, whereas the indictment was not presented until November 1st, 1938, a



period of more than three years after the commission of the alleged offense as charged by Paragraph 1 of the indictment and as repeated in Paragraphs 47, 63, 76, and 88.

Wherefore, the defendants demand judgment dismissing the indictment in whole and discharging them from custody or judgment, dismissing the indictment in part as to each and every separate count thereof and to have such count or counts stricken from the indictment.

JOSEPH A. PADWAY,  
*Attorney for defendants.*

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In United States District Court

[Title omitted.]

*Demurrer of Leslie G. Goudie, one of the defendants herein, to the indictment and motion of said defendant to quash said indictment*

Filed January 7, 1939

Now comes the defendant, Leslie G. Goudie, by Weymouth Kirkland and Jay Fred Reeve, his attorneys, and having read the indictment herein, says that said indictment and each count thereof and the matters therein contained, in manner and form as the same are therein alleged and set forth, are insufficient in law to require this defendant to plead to said indictment or any count thereof, or to answer the same, and that said indictment and each count thereof are insufficient in law to sustain a judgment against this defendant; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, demurs to said indictment and each count thereof and moves to quash the same upon the following grounds:

1. Said indictment, and each count thereof, does not aver or set forth any facts or allege or charge the commission of any acts by the defendant constituting an offense against the United States of America.

113 2. Said indictment, and each count thereof, in purporting to allege an offense against the United States of America, fails to do so with the certainty required by law, but on the contrary is vague, indefinite, and uncertain to such an extent that this defendant is not advised thereby of the nature of the charges against him so that he may properly prepare and submit his defense.

114 3. The indictment is void in that it was returned, without authority of law, at the October Term of this Court in the year 1938 by a Grand Jury impaneled and sworn at the July Term of said Court in the year 1938 and

(a) The orders of August 31, 1938, and September 27, 1938, authorizing the Grand Jury to sit, respectively, during the September and October 1938 terms of the District Court, do not find or disclose that

this indictment was the result of an investigation begun but not finished during said July Term, or that any investigation was begun but not finished during said July 1938 Term of this Court.

(b) The indictment does not show that the investigations alleged to have been begun but not finished during the July 1938 Term were not completed in the September 1938 Term.

4. None of the counts of said indictment states facts showing that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States; that is to say,

(a) The first paragraph of each count, which undertakes to describe the supposed combination and conspiracy therein alleged, does not state facts showing that the matters and things therein complained of are or were an undue or unreasonable restraint of interstate trade and commerce.

115 Wherefore, this defendant prays judgment that this demurrer be sustained as to him, that said indictment, and each count thereof, be quashed, and that he be dismissed and discharged of this indictment by the Court.

LESLIE G. GOUDIE,

By (Signed) WEYMOUTH KIRKLAND,

(Signed) JAY FRED REEVE,

*His Attorneys.*

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In United States District Court

[Title omitted.]

*Motion to quash and demurrer for and in behalf of the defendants,  
Pure Milk Association, Don. N. Geyer, Edward F. Cooke, E. E.  
Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case*

Filed January 7, 1939

Now come the defendants, Pure Milk Association, by its undersigned attorneys, and Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case, each in their own proper person, by the undersigned attorneys, and move to quash and demur to the indictment and each and every count thereof as presented herein against them and each of them, and in support thereof show:

1. Said indictment and each and every count thereof fails to state an act or omission committed by these defendants, or any of them, contrary to the Act of Congress approved July 2, 1890, entitled "An Act to protect Trade and Commerce against Unlawful Restraints and Monopolies," or existing laws applicable to each of these defendants.

2. Said indictment and each and every count thereof fails to state a cause of action for indictment and prosecution against all or any

one of these defendants, or under any existing laws applicable to these defendants, or either of them, by or in the name of the United States of America.

117 3. Said indictment and each count thereof fails to state a cause of action for indictment and prosecution for any offense, act or thing done or committed by these defendants, or any of them, against the existing laws and statutes of the United States of America.

4. Said indictment and each and every count thereof fails to state a cause of action against these defendants, or any of them, for an offense against any existing laws and statutes of the United States.

5. Said indictment and each count thereof, and any projected plan of prosecution thereunder is a departure from the due and orderly process of law intended and provided for by existing Acts of Congress, hereinafter mentioned or referred to, relating to associations of producers of agricultural products and cooperative marketing agencies adjunct thereto, for the determination and correction of the evils, misuses or transgressions of its rights, powers and privileges attributed to the defendant, Pure Milk Association, and the several individuals associated with or employed by it in its acts and conduct as a cooperative marketing agency.

6. That said indictment and each count thereof is designed for purely punitive administration for violations of Section 1 of the Act of Congress approved July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly known as the Sherman Anti-Trust Act of 1890, in accordance with the form and purpose of said law at the time of its enactment and without reference or consideration to subsequent legislation concerning monopolies and acts and conduct in restraint of interstate commerce and trade, and totally ignores all later enacted and presently existing supplementary federal and state laws authorizing the creation of agricultural cooperative organizations or associations by persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers, and the organization and operation of associations, corporate or otherwise, for the purpose of collectively processing, preparing for market, handling and marketing in interstate and foreign commerce such products of persons so engaged, and the corollary acts of Congress enacted concurrently therewith and in addition thereto and especially designed to regulate the conduct of such associations and organizations both with respect to monopolies and restraints upon interstate commerce and trade. Said later enactments which are hereinafter more particularly set forth or referred to, do not provide for, nor is warranted thereunder any choice or election of remedy by way of indictment or complaint and inquiry in respect to the application of the antitrust laws to agricultural cooperatives or cooperative marketing agencies such as the defendant, Pure Milk Association, or to correct the evils, misdirections or transgressions, attributed to these defendants, set forth or referred to in the indictment.

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7. Said indictment and each count thereof totally ignores the provisions of said later and supplementary federal legislation intended to furnish means of applying corrective measures by way of complaint by serving upon such association a complaint stating its charge in that respect together with a notice for hearing, specifying a day and place not less than thirty days after the service thereof requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade, and permitting the association so complained of to show cause why such order should not be entered, and the further action by and under the authority vested by said later enactment in the Secretary of Agriculture for the purpose of correcting mis-  
119 usages by such associations with respect to monopolies or restraints upon interstate trade and commerce, instead of direct and peremptory penal action by way of criminal indictment and prosecution; that said indictment and each and every count thereof is an action in form of prosecution by indictment, and therefore an unauthorized departure from the policy of correction through complaint and inquiry of and by the Secretary of Agriculture of the United States as provided by said supplementary legislation hereinafter more particularly set out and referred to.

8. That said indictment and each count thereof is an unauthorized and unwarranted attempt to prosecute these defendants and enforce the penal provisions of Section 1 of said Sherman Anti-Trust Law of July 2, 1890, without any regard to said subsequent legislation herein referred to; which definitely excludes these defendants, and each of them, from any prosecution under the penal provisions of said Act, by way of indictment, and is contrary to and in violation of the due process clause of Article V of the Amendments of the Federal Constitution.

9. That said indictment and each count thereof fails to charge the defendant, Pure Milk Association, and its officers and agents named in said indictment, with having violated any of the provisions of The Agricultural Cooperative Act of Illinois under which the defendant, Pure Milk Association, was organized and is now doing business.

10. That said indictment and each count thereof fails to charge these defendants of having violated any of the Federal laws applicable to cooperative associations engaged in cooperative bargaining for and in behalf of its member producers, as provided by the Acts of Congress passed subsequent to said Sherman Anti-Trust law  
120 of July 2, 1890, especially designed to regulate the conduct of such associations with respect to interstate commerce; that each and every count filed herein fails to charge these defendants with having violated any of the terms and conditions of the Clayton Anti-Trust Act of October 15, 1914, the Capper-Volstead Act of February 18, 1922, the Cooperative Marketing Act of July 2, 1926, the Agricultural Adjustment Act of May 12, 1933, or the Agricultural



Marketing Agreement Act of 1937, all of which are Federal acts applicable to cooperative associations engaged in cooperative bargaining, for or on behalf of their producer members.

11. That said indictment and each count thereof fails to make any direct allegations of any overt act on the part of these defendants, or any of them, as having in any way unlawfully interfered with interstate commerce in the transportation of fluid milk from the states of Michigan, Wisconsin, and Indiana into the State of Illinois in violation of any of the acts hereinabove referred to.

12. That said indictment and each count thereof is an aggression upon the rights and powers especially delegated to the Secretary of Agriculture by the supplementary Acts of Congress herein referred to and by virtue of which he is the duly constituted authority to control the policies and conduct of agricultural cooperative and marketing associations and to apprehend and administer corrective measures for misuse or abuse by such associations or agencies with respect to restraint of trade and commerce in fluid milk, in or among the several states of the United States, and to protect said trade and commerce against unlawful restraints and monopolies.

13. That said indictment and each and every count thereof fails to adequately and with sufficient particularity to charge the defendants, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case, or any one of them, with having authorized, ordered, or done any of the overt acts alleged therein.

121 14. That in said indictment it is charged that these defendants were parties to the creation or fixing of "uniform, arbitrary, and non-competitive prices," but nowhere in any of said counts is it charged that the price of any agricultural product was "unduly enhanced" by reason thereof.

15. That in said indictment mere naked charges are made concerning the use of certain contracts and price lists therein mentioned, without stating the material substance thereof, or the manner in which these defendants, or any or either of them, by and through the use or misuse of said contracts or the publication of said price lists, have violated any of the above-mentioned acts, so that this Court can determine on the face of the indictment whether or not said contracts, price lists, or any other agreements mentioned therein were or are in violation of the Sherman Anti-Trust Act of July 2, 1890, or any subsequent laws above referred to, under which these defendants, or any or either of them, are sought to or could be prosecuted by way of criminal indictment, copies of which contracts and price lists these defendants are ready and willing to produce so that this Court may determine whether they are in fact in violation of any of the laws above referred to.

16. That the indictment fails to state a cause of action against these defendants, or any or either of them, of which this Court ought to accept jurisdiction, for the reason that the alleged cause of action

stated in the indictment and each count thereof consists of matters of alleged offenses which, under the existing laws and statutes, are cognizable for the purpose of corrective administration only by the Secretary of Agriculture of the United States, and are not offenses which constitute such matter for prosecution by way of criminal indictment.

122 17. That the indictment and each and every count thereof fails to show that during the period covered thereby, including the date of the filing thereof, there was in force certain Acts of Congress which were passed, approved, and became effective subsequent to the enactment of the Sherman Anti-Trust Act as approved July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," no part of which subsequent Acts of Congress are included, considered, or referred to in said indictment; and all of which, or some parts of which, contain provisions which require the allegation of acts, intents, purposes, and designs set forth with reasonable particularity, directly, and not inferentially, and sufficiently certain and clear to show a violation thereof before any valid indictment for the offenses charged in this indictment could be found against these defendants, or any or either of them, none of which said allegations are contained or set forth in this indictment or any count thereof.

18. That said indictment recites that the Pure Milk Association is organized under the Act of the General Assembly of the State of Illinois entitled, "The Cooperative Marketing Act," and that since the date of its incorporation under said act and during the period covered by the indictment, Pure Milk Association has been duly authorized to do business under and by virtue of said act; that said indictment and each and every count thereof fails to allege the object and purpose of said organization as shown by the Articles of Incorporation of the Pure Milk Association as certified to by the Secretary of State of the State of Illinois, which are in words and figures as follows:

"The purpose for which it is formed is to be a non-profit, co-operative agricultural association without capital stock, organized for the mutual help and benefit of its members; to promote the general welfare of its members and to provide better and more economical methods of marketing the dairy products of its members through cooperation; to act as agent for its members in handling and marketing their dairy products and in supplying to its members machinery, equipment, and supplies; to cooperate with other associations or individuals engaged in similar purposes; to have and exercise all of the powers necessary and proper to carry into effect the purpose for which such corporation is formed, and to do any and all things incident to the above purpose."

123 or that part of Section 3 of Article One of the By-Laws of said Pure Milk Association adopted by the members thereof, relating to the purpose for which it was formed, which reads as follows:

"The purpose for which it is formed is: To be a non-profit, co-operative agricultural association without capital stock instituted for the mutual help and benefit of its members; to promote the general welfare of its members and the business of dairying in the Chicago Fluid Milk District; to cooperate with other associations or individuals engaged in similar purposes; to have and exercise all of the powers necessary and proper to carry into effect the purpose of which such corporation is formed, and to do any and all things incident to the above purpose."

or of Section 4 of Article Two of the said By-Laws, which reads as follows:

"The voting power of all members shall be equal. Each member shall have one vote and one vote only."

or the provisions of Section 2 (c) of said "The Agricultural Co-operative Act" of the State of Illinois which provides:

"The term 'association' means any corporation organized under this Act, or any corporation formed under any general or special act of this or any other state as a cooperative association, organized for the mutual benefit of its members, and in which the returns on the stock or membership capital is limited to an amount not to exceed eight per centum (8%) per annum, and in which during any fiscal year thereof the value of business done with non-members shall not exceed the business done with members during the same period and in which substantially all of the issued and outstanding shares of capital stock or memberships are owned, held, and controlled directly or indirectly, by producers of agricultural products."

or of Section 15 of said Act which provides:

"No member in any association without capital stock shall be entitled to more than one (1) vote."

All of said provisions of said Act and By-Laws conform to the requirements of the said Capper-Volstead Act which provides that associations that desire to come within the Act must be

124 "operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein or

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per cent per annum.

"And in any case to the following:

"Third. That the association shall not deal in products of non-members to an amount greater in value than such as are handled by it for members."

That said indictment and each and every count thereof fails to charge defendants Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghton, F. J. Knox, Lowell D. Oranger, and

John P. Case, or any one of them, with having violated any of the requirements of the Capper-Volstead Act, or with carrying out the objects and purposes for which said Pure Milk Association was organized under the laws of the State of Illinois in any unlawful manner, or with having violated any of the laws of the United States in existence during the period covered by the indictment, designed for the protection of trade and commerce among the several states against the unlawful restraints and monopolies.

19. That said indictment and each and every count thereof fails to charge an offense against the United States of America with the certainty required by law so as to fairly inform these defendants of the nature of the charges intended thereby to be preferred against them and each of them and thereby enable these defendants to understand the exact nature of the charge to be met and properly prepare and submit their several defenses, and is in many other respects vague, indefinite, and uncertain.

20. The indictment is void in that it was returned without authority of law at a term of this court which was not the term at which the Grand Jury which returned the indictment was convened, for the following reasons:

125 (a) Neither the order of July 31, 1938, nor the order of September 27, 1938, entered by this court, each of which purports to authorize the Grand Jury to sit beyond the July 1938 term of this court, contains findings of fact to the effect that there was any unfinished investigations begun by said Grand Jury at the July 1938 term of this court which would warrant this court in permitting said Grand Jury to continue to sit beyond said July 1938 term thereof, in accordance with the provisions of Section 284 of the Act of Congress of March 3, 1911, entitled "An Act to Codify, Revise, and Amend the Laws Relating to Judiciary" as amended. (U. S. Code Annotated, Title 28, Section 421.)

(b) That the orders of August 31, 1938, and of September 27, 1938, were entered several days prior to the termination of the August 1938 and of the September 1938 terms, respectively, of this court in violation of Section 284 of the Act of Congress of March 3, 1911, entitled "An Act to Codify, Revise, and Amend the Laws Relating to Judiciary" as amended. (U. S. Code Annotated, Title 28, Section 421.)

(c) The indictment fails to disclose that any investigation begun by the Grand Jury in the July 1938 term of this court was not completed prior to the October 1938 term.

(d) This court had no authority to authorize said Grand Jury to sit during the October 1938 term of this court on its request because by order entered on August 31, 1938, this court had attempted to authorize said Grand Jury to sit during the September 1938 term of this court.



21. The indictment and each and every count thereof fails to allege facts sufficient to show an unlawful combination and conspiracy or means to render said alleged combination and conspiracy unlawful under Section 1 of an Act of Congress dated July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

22. That Count 2 of said indictment fails to state facts sufficient to constitute a crime against the United States under Section 1 of an Act of Congress dated July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," in that it contains allegations repugnant one to the other, certain of which are entirely consistent with the innocence of these defendants of the alleged crime sought to be charged in said count.

23. Count 3 of the indictment does not state facts sufficient to constitute a crime against the United States under Section 1 of an Act of Congress dated July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," in that:

(a) The count fails to set forth facts sufficient to show that the defendants combined and conspired to restrain trade or commerce among the several states.

(b) The count fails to set forth facts to show that the distribution of fluid milk by so-called independent distributors, or the distribution of milk to stores and by stores in the City of Chicago, constitute trade or commerce among the several states.

24. Count 4 of the indictment fails to state facts sufficient to constitute a crime against the United States under Section 1 of an Act of Congress dated July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," in that:

(a) The count fails to allege facts to demonstrate an unreasonable or direct restraint of trade or commerce among the several states.

(b) The count fails to allege means of accomplishing said combination which would render the same unlawful.

127 (c) The count fails to allege facts to demonstrate any restraint of trade or commerce among the several states.

(d) The count fails to sufficiently define the means, i. e., the base surplus plan, alleged to have been adopted by the defendants for the purpose of restraining trade or commerce among the several states.

Because certain defects in said indictment are specified herein it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, the defendants, Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case, and each of them, pray that this motion to quash and demurrer may be sustained and demand judgment dismissing

the indictment and each and every count thereof, discharging them and each of them from custody.

(Signed) Pure Milk Association, (signed) Don N. Geyer, (signed) Edward F. Cooke, (signed) E. E. Houghtby, (signed) F. J. Knox, (signed) Lowell D. Oranger, (signed) John P. Case; by (signed) Schuyler Hennesy, by (signed) George W. Lennon, by (signed) Wm. C. Graves, by (signed) Martin Burns, Attorney for said Defendants, 231 South LaSalle Street, Chicago, Illinois.

To Messrs. WILLIAM J. CAMPBELL, *United States Attorney.*

LEO F. TIERNEY, *Special Assistant Attorney General.*

128 [Duly sworn to by Martin Burns; jurat omitted in printing.]

129 In United States District Court

[Title omitted,]

*Demurrer of Leland Spencer*

Filed January 7, 1939

And the defendant, Leland Spencer, by Isham, Lincoln & Beale, Ben H. Matthews, and James P. Dillie, his attorneys, comes and defends, etc.; when, etc.; and says that the said indictment and the matters therein contained in each and every count thereof, in manner and in form as the same are above set forth, are not sufficient in law for the plaintiff to maintain its aforesaid action, and that he, the defendant, is not bound by law to answer the same; and this he is ready to verify; wherefore, for want of a sufficient indictment in this behalf, this defendant, Leland Spencer, prays judgment and that the plaintiff may be barred from maintaining its aforesaid action, etc.

And the defendant, Leland Spencer, shows to the court here the following causes of demurrer to the said indictment and each and every count thereof, that is to say that,

1. The indictment and each and every count thereof fails to charge any offense under the laws of the United States.
- 130 2. The indictment and each and every count thereof fails to charge an unlawful combination and conspiracy in restraint of trade and commerce among the several states of the United States, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."
3. The indictment and each and every count thereof shows on its face that the fluid milk, which is the subject matter of the alleged acts in restraint of trade, was not and did not constitute commerce

among the several states at the various times it is alleged to be in said indictment and each and every count thereof.

4. The indictment and each and every count thereof, other than by way of conclusion of the pleader, fails to allege sufficient facts which will justify this court in saying that, as a matter of law, the acts therein complained of constituted an unlawful combination and conspiracy in restraint of trade and commerce among the several states of the United States, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

5. Counts 2 and 3 of the indictment show that the acts and things therein alleged and complained of relate to an article, namely, fluid milk, which was then the subject of local distribution within the City of Chicago, and therefore was not and could not then be trade or commerce among the several states as contemplated by

Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

6. Count 3 of the indictment fails to allege any facts relating to an article or thing, and particularly fluid milk, which is or was the subject of trade or commerce among the several states, as contemplated by Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," at and during the time of the commission of the acts therein alleged and complained of.

7. The indictment and each and every count thereof shows that the alleged unlawful combination and conspiracy is based upon an alleged concerted plan and agreement between the defendant, Pure Milk Association, and other defendants therein named; wherefore, said indictment and each and every count thereof fails to charge any offense as defined by Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or any other Act of Congress, for the reason that said Pure Milk Association was and is specifically authorized by an Act of Congress, namely, Section 291, Title 7, U. S. C., commonly known as the Capper-Volstead Act to enter into such agreements.

8. The indictment and each and every count thereof shows that the alleged unlawful combination and conspiracy is based upon an alleged contract by and between the defendant, Pure Milk Association, and each of the defendant major distributors; wherefore, said indictment and each and every count thereof fails to charge any offense as defined

by Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or any other Act of Congress, for the reason that said Pure Milk Association was and is specifically authorized by an Act of Congress, namely, Section 291, Title 7, U. S. C., commonly known as the Capper-Volstead Act to enter into such agreements.

9. The indictment and each and every count thereof shows this defendant's only connection with the alleged combination and con-

spiracy to have been his actions as an arbitrator in certain arbitration proceedings between the defendant, Pure Milk Association, and the defendant's major distributors, wherein a certain dispute with respect to the price provisions that were contained in the alleged agreements between said defendants was arbitrated; wherefore, said indictment and each and every count thereof fails to charge any offense against this defendant as defined by Section 1, Title 15, of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or any other Act of Congress, for the reason that said Pure Milk Association was and is specifically authorized by an Act of Congress, namely, Section 291, Title 7, U. S. C., commonly known as the Capper-Volstead Act to enter into such agreements.

10. The indictment and each and every count thereof shows that the alleged acts and things therein complained of are subject only to a complaint by the Secretary of Agriculture of the United States, who is directed and authorized by the statute in such case made and provided, namely, an Act of Congress commonly known as the Capper-Volstead Act, being Section 291, Title 7, U. S. C., to take such  
133 action and such action only as therein directed in reference to the alleged acts and things complained of in the indictment herein and in each and every count thereof.

11. Nowhere in said indictment, or in any count thereof, it is charged that this defendant did knowingly combine and conspire with any other defendant therein named, or with any other person to the Grand Jurors unknown; to do any act in violation of the laws of the United States, and particularly Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

12. Count 2 of the indictment alleges no facts to substantiate the conclusions of the pleader that the actions of this defendant did in fact fix and determine the prices paid by all persons who purchased fluid milk from distributors in the City of Chicago, and that such prices were arbitrary and noncompetitive.

13. No act is charged in the indictment or any count thereof as to this defendant having a tendency to effect the object of the conspiracy charged.

14. No act is charged in the indictment or any count thereof having a tendency to effect the object of the conspiracy charged.

15. There is no casual connection between the means and methods alleged to have been intended to effect and which are alleged did effect the combination and conspiracy charged in the indictment or any count thereof.

16. There is no casual connection between the acts alleged and the conspiracy charged in the indictment, or any count thereof.

134 17. The indictment, and each and every count thereof, attempts to charge an offense against the laws of the United States by charging acts which relate to trade and commerce solely within the State of Illinois, and over which this court has no juris-



diction and which is not an offense against the laws of the United States.

18. The indictment, and each and every count thereof, fails to allege acts relating solely to trade and commerce among the several states.

19. The indictment, and each and every count thereof, shows no intent to restrain trade and commerce among the several states.

20. The indictment, and each and every count thereof, fails to charge an offense in respect to an article of trade and commerce among the several states.

21. The indictment, and each and every count thereof, fails to inform this defendant of the nature and character of the offense with which he is charged in such manner and with such detail as will identify the same so that a verdict and judgment thereon could be pleaded as a bar to any subsequent prosecution for the same offense.

22. Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," has been so amended, altered, modified, and restricted by the Act of Congress of February 18, 1922, entitled "An Act to authorize association of producers of agricultural products," commonly known as the "Capper-Volstead Act," as to deny to

135 this defendant due process of law and equal protection of the laws in contravention of the Fifth Amendment of the Constitution of the United States of America; that is to say,

(a) Said Act of July 2, 1890, as amended, altered, modified, and restricted as aforesaid arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and other persons, including this defendant, and other associations, with respect to the definition, prohibition, and punishment of monopolies and restraints of trade in interstate trade and commerce.

(b) Said Act of July 2, 1890, as amended, altered, modified, and restricted as aforesaid arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and all other persons, including this defendant, and other associations, by legalizing certain monopolies and restraints of interstate trade and commerce by such producers which are forbidden if intended or accomplished by others.

23. The allegations of Count Four of said indictment do not show that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say,

136 (a) It appears from the said allegations that the object and effect of the said supposed combination and conspiracy therein alleged was the adoption of the base-surplus plan, and it does not appear that the base-surplus plan is or was an unlawful or unreasonable restraint of trade or commerce.

(b) It appears from the allegations of the indictment that the alleged restraint and control complained of in Count Four was and

is restraint and control of production and not restraint or control of commerce among the several states.

(c) It does not appear by the allegations of said Count that the base-surplus plan limits or restrains either the production of milk or trade and commerce among the several states.

25. None of the counts of said indictment cites facts showing that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say,

(a) The first paragraph of each count which undertakes to describe the supposed combination and conspiracy therein alleged does not state facts showing that the matters and things therein complained of are or were an undue or unreasonable restraint of interstate trade or commerce.

(b) The means by which said supposed combinations and conspiracies were intended to be effected, are not stated in said indictment or in any count thereof.

137 (c) It does not appear from the allegations of said counts or of any of them that the objects or purposes of said supposed combinations and conspiracies or of any of them were intended to be accomplished by any means which would effect an undue or unreasonable restraint of interstate trade or commerce.

26. The alleged conspiracy set forth in the indictment and each and every count thereof relates to a subject matter which is not justiciable but is removed from the criminal jurisdiction of this Court, in that the Congress of the United States in its plenary power, as the legislative department of the Federal Government, has legislated to remove the subject matter of each count from the purview of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" and to devolve upon the Executive Department of the Federal Government power to regulate said subject matter by administrative action.

27. The indictment and each and every count thereof in setting forth said alleged conspiracy shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

28. The indictment and each and every count thereof charges acts, the substance of which is just as consistent with the hypothesis of innocence as with that of guilt.

138 29. The indictment and each and every count thereof shows that uniform terms and conditions for the purchase of all fluid milk purchased through the defendant, Pure Milk Association, had already been fixed, determined, and agreed upon prior to the time that this defendant is alleged to have acted as an arbitrator and to have thereby fixed and determined said prices.

30. The indictment and each and every count thereof joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

31. The indictment and each and every count thereof charges an offense which is barred by the Statute of Limitations.

32. The indictment and each and every count thereof is void in that it was returned without authority of law at the October Term of this Court in the year 1938 by a Grand Jury, impaneled and sworn at the July Term of said Court in the year 1938 and illegally sitting during said October Term, that is to say,

(a) The orders of August 31, 1938, and September 27, 1938, purporting to authorize the said Grand Jury to sit, respectively, during the September and October 1938 Terms of this Court, do not find or disclose that this indictment was the result of an investigation begun but not finished during said July Term or that any investigation was begun but not finished during said July 1938 Term of this Court.

139 (b) The indictment does not show that the investigations alleged to have been begun but not finished during the July 1938 Term of this Court were not completed in the September 1938 Term of this Court.

33. Because certain defects are specified herein, it is not intended that any other defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect, as if the same were herein specifically set forth and alleged.

LELAND SPENCER,

*Defendant.*

(Signed) ISHAM, LINCOLN & BEALE,

By (Signed) BEN H. MATTHEWS & JAMES P. DILLIE,

*His Attorneys.*

140

In United States District Court

[Title omitted.]

*Motion to quash*

, Filed January 7, 1939

Now comes the defendant, Leland Spencer, by Isham, Lincoln & Beale, his attorneys, and moves the Court to quash the indictment and each and every count thereof returned against him in the above-entitled cause, for the following reason:

The indictment and each and every count thereof is void in that it was returned without authority of law at the October Term of this Court in the year 1938 by a Grand Jury, impaneled and sworn at the July Term of said Court in the year 1938 and illegally sitting during said October Term, that is to say,

(a) The orders of August 31, 1938, and September 27, 1938, purporting to authorize the said Grand Jury to sit, respectively, during the September and October 1938 Terms of this Court, do not find or disclose that this indictment was the result of an investigation

141 begun but not finished during said July Term or that any investigation was begun but not finished during said July 1938 Term of this Court.

(b) The indictment does not show that the investigations alleged to have been begun but not finished during the July 1938 Term of this Court were not completed in the September 1938 Term of this Court.

Wherefore, this defendant prays judgment that said indictment, and each and every count thereof, be quashed, and that he be dismissed and discharged therefrom.

LELAND SPENCER,  
*Defendant.*

ISHAM, LINCOLN & BEALE,  
(Signed) By BEN H. MATTHEWS & JAMES H. DILLIE,  
*His Attorneys.*

143 In United States District Court

[Title omitted.]

*Notice*

To Hon. WILLIAM J. CAMPBELL,  
*United States Attorney,*  
*United States Court House, Chicago, Illinois, and*  
LEO F. TIERNEY, Esq.,  
*Special Assistant Attorney General,*  
*208 South LaSalle Street, Chicago, Illinois.*

You and each of you will please take notice that on Friday, July 28, 1939, at the opening of court in the forenoon, or as soon thereafter as counsel may be heard, I shall appear before the Honorable Charles E. Woodward, Judge of the United States District Court, in the room usually occupied by him as a court room in the United States Court House, at Chicago, Illinois, or before any other judge who may be sitting in his place and stead, and shall then and there present the written motion of the defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin (a copy of which motion and a copy of the demurer mentioned therein being attached hereto and herewith served upon you); and shall then and there make such other and further motions in the premises as may be necessary to obtain the relief sought; at which time and place you may be present if you so desire.

(Signed) CHARLES F. RATHBUN,  
*Attorney for above-named defendants.*

Received a copy of the above and foregoing Notice, together with a copy of the Motion and Demurrer therein mentioned, this 27th day of July 1939.

(Signed) WILLIAM J. CAMPBELL,  
*United States Attorney.*

(Signed) LEO F. TIERNEY,  
*Special Assistant Attorney General.*



[Title omitted.]

*Motion for leave to withdraw pleas of not guilty*

Filed July 28, 1939

Now come the defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin, by Charles F. Rathbun, their attorney, and jointly and severally move the court for leave to withdraw their several pleas of not guilty heretofore entered to the indictment in the above-entitled cause; and further move the court for leave to file herein instantter the joint and several demurrers of the defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin to said indictment.

(Signed) CHARLES F. RATHBUN,  
*Attorney for said defendants.*

[Title omitted.]

*Joint and several demurrer of the defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin, to the indictment herein*

Filed July 28, 1939

The defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin, by Charles F. Rathbun, their attorney, jointly and severally come and demur to the said indictment, and each count thereof, and say that the same is not sufficient in law for them, or either of them, to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which the court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

146. 3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

4. The alleged conspiracy set forth in the indictment, and each count thereof, relates to matters entirely within the jurisdiction of

the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment, and each count thereof, relates to a subject matter that is not justiciable, but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

147 7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to relation of these defendants, or either of them, to the other co-defendants named therein to connect them, or either of them, with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

10. There is misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise these defendants, or either of them, of the nature of the charge against them, or either of them.

148 14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, these defendants, or either of them, do not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) CHARLES F. RATHBUN,  
*Attorney for said defendants.*

[Title omitted.]

*Order granting leave to withdraw pleas of not guilty, etc.*

July 28, 1939

This cause coming on to be heard upon the motion of the defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin, by Charles F. Rathbun, their attorney, for leave to withdraw their several pleas of not guilty heretofore entered to the indictment in the above entitled cause, and for leave to file herein instanter their joint and several demurrers, due notice of the pendency of said motion having been given, the court having heard arguments of counsel and being fully advised in the premises,

It is ordered, that leave be and it hereby is granted to the defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin, to withdraw their several pleas of not guilty heretofore entered to the indictment in the above entitled cause; and

It is further ordered that leave be and it hereby is granted to the defendants, Herman N. Bundesen, Paul Krueger; and William J. Guerin, to file herein instanter their joint and several demurrers to the indictment herein.

Enter:

(Signed) CHARLES E. WOODWARD,  
Judge.

Dated: July 28, 1939.

[Title omitted.]

*Order allowing appeal to the Supreme Court of the United States*

Filed August 17, 1939.

This cause having come on this day before the Court on the petition of the United States of America, petitioner herein, praying for the allowance of an appeal to the Supreme Court of the United States for a reversal of the order and judgment herein dismissing the indictment as to all defendants and sustaining certain of the demurrers, motions to quash and special pleas in bar interposed by the defendants, The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, W. A. Wentworth, Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Hunding Dairy Company, Carl W. Hunding, Capitol Dairy Company, Hyman I. Freed, Sidney Wanzer & Sons, Inc., H. Stanley Wanzer, Gordon B. Wanzer, International

Dairy Company, Louis Janata, Western-United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, Milk Dealers Bottle Exchange, Associated Milk Dealers, Inc., Paul Potter, Otto Black, Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, David A. Riskind, Leslie G. Goudie, Daniel A. Gilbert, Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, John P. Case, Leland Spencer, Hermann N. Bundesen, Paul Krueger, and William Guerin to the first, second, third, and fourth counts in the indictment in said cause, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said motion, together with petitioner's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is therefore, by the Court,

Ordered and adjudged that the United States of America be and it is hereby allowed an appeal from the order and judgment of this Court sustaining the demurrers and motions of the defendants to quash the indictment and the special pleas in bar, and dismissing the indictment as to all defendants, to the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court, and that a citation be issued as provided by law.

It is further ordered that the United States of America be and it is hereby permitted a period of forty days from the date hereof in which to file and docket said appeal in the Supreme Court of the United States.

Dated at Chicago, Illinois, this 17th day of August 1939.

By the Court:

CHARLES E. WOODWARD,  
District Judge.

154

In United States District Court

[Title omitted.]

*Petition for appeal*

Filed August 17, 1939

Comes now the United States of America, plaintiff herein, and states that on the 28th day of July, 1939, demurrers and motions to quash interposed by the defendants The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, W. A. Wentworth, Bowman Dairy



Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Hunding Dairy Company, Carl W. Hunding, Capitol Dairy Company, Hyman I. Freed, Sidney Wanzer & Sons, Inc., H. Stanley Wanzer, Gordon B. Wanzer, International Dairy Company, Louis Janata, Western-United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, Milk Dealers Bottie Exchange, Associated Milk Dealers, Inc., Paul Potter, Otto Black, Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, David A. Riskind, Leslie G. Goudie, Daniel A. Gilbert, Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, E. J. Knox, Lowell D. Oranger, John P. Case, Leland Spencer, Herman N. Bundesen, Paul Krueger, and William

155 Guerin to each and every count of the indictment herein were by the Court sustained, and the plaintiff feeling aggrieved at the ruling of said District Court in sustaining said demurrers and motions to quash, as to the first, second, third, and fourth counts, prays that it may be allowed to appeal to the Supreme Court of the United States for a reversal of said judgment and order in so far as it sustains the demurrers and motions to quash of the defendants to the first, second, third, and fourth counts of the indictment, and that a Transcript of the Record in this cause duly authenticated may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause

(Signed) LEO F. TIERNEY,

Leo F. Tierney,

*Special Assistant to the Attorney General.*

(Signed) WILLIAM J. CAMPBELL,

William J. Campbell,

*United States Attorney,*

*Northern District of Illinois, Eastern Division.*

157

In United States District Court

[Title omitted.]

*Assignment of errors*

Filed August 17, 1939

Now comes the United States of America, having heretofore filed its petition for appeal herein, and says that as a result of the action taken by this Court in sustaining the several demurrers and motions to quash filed against the indictment in this cause as to Counts One, Two, Three, and Four and, in effect, sustaining special pleas in bar of prosecution under the said indictment and in entering judgment there-

on in favor of the defendants on said demurrers, motions to quash and special pleas, there has intervened manifest and prejudicial error to the prejudice of the United States of America in the above entitled cause. The said errors so intervening are enumerated as follows, to wit:

1. The Court committed material error against the plaintiff in sustaining the various joint and several demurrers, motions to quash, and special pleas of the defendants The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, W. A. Wentworth, Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Hunding Dairy Company, Carl W. Hunding, Capitol Dairy Company, Hyman I. Freed, Sidney Wanzer & Sons, Inc., H. Stanley Wanzer, Gordon B. Wanzer, International Dairy Company, Louis Janata, Western-United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, Milk Dealers Bottle Exchange, Associated Milk Dealers, Inc., Paul Potter, Otto Black, Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, David A. Riskind, Leslie G. Goudie, Daniel A. Gilbert, Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, John P. Case, Leland Spencer, Herman N. Bundesen, Paul Krueger, and William Guerin interposed to the first, second, third, and fourth counts of the indictment in the above entitled cause.

2. The Court committed material error against the plaintiff in sustaining said demurrers, motions to quash, and special pleas interposed to the first, second, and fourth counts of the indictment in the above entitled cause, on the ground that no indictment will lie under Section 1 of the Sherman Act, c. 647, 26 Stat. 209, Title 15, U. S. C., Section 1, with respect to the production and marketing of agricultural products, including milk, because the production and marketing of agricultural products, including milk, are removed from the purview of the Sherman Act by the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, Title 7, U. S. C., Section 601, as amended August 24, 1935, c. 641, 49 Stat. 750, Title 7, U. S. C., Section 601, and as reenacted and amended by the Agricultural Marketing Agreement Act of June 3, 1937, c. 296, 50 Stat. 246, Title 7, U. S. C., Supp. IV, Par. 601 et seq.

3. The Court committed material error against the plaintiff in sustaining the joint and several demurrers and special pleas of the defendants Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case which were interposed as to Counts One, Two, Three, and Four of the indictment in the above entitled cause, on the ground that no indictment will lie under Section 1 of the Sherman Act, c. 647, 26 Stat. 209, Title 15, U. S. C., Section 1, with respect to the production and marketing of agricultural products, including milk, because Section 6 of the Clayton Act, c. 323, 38 Stat. 730, Title 15,

U. S. C., Section 17, Sections 1 and 2 of the Capper-Volstead Act, c. 57, 42 Stat. 388, Title 7, U. S. C., Section 291, and the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, Title 7, U. S. C., Section 601, as amended August 24, 1935, c. 641, 49 Stat. 750, Title 7, U. S. C., Section 601, and as reenacted and amended by the Agricultural Marketing Agreement Act of June 3, 1937, c. 296, 50 Stat. 246, Title 7, U. S. C., Supp. IV, Par. 601, et seq., when properly construed, exempt the Pure Milk Association, an agricultural cooperative association, together with its officers and agents, from prosecution under Section 1 of the Sherman Act.

4. The Court committed material error against the plaintiff in dismissing Counts One, Two, Three, and Four of the indictment in the above entitled cause as to all of the defendants.

Wherefore, the United States of America respectfully prays that the action taken by said Court in sustaining the said demurrers, motions to quash and special pleas filed by the defendants against the indictment herein as to Counts One, Two, Three, and Four and the ruling of the Court in entering judgment in favor of the defendants on said demurrers, motions to quash, and special pleas be set aside and held for naught.

(Signed) LEO F. TIERNEY,  
Leo F. Tierney,

*Special Assistant to the Attorney General.*

(Signed) WILLIAM J. CAMPBELL,  
William J. Campbell,

*United States Attorney,  
Northern District of Illinois, Eastern Division.*

166 In United States District Court, Northern District of Illinois,  
Eastern Division

No. 31197

UNITED STATES OF AMERICA

v.

THE BORDEN COMPANY ET AL.

*Opinion*

Filed July 13, 1939

WOODWARD, District Judge: This matter comes up on the several demurrers and motions to quash an indictment in four counts, charging fourteen corporations and associations and forty-three individuals with engaging in an unlawful combination and conspiracy in restraint of interstate commerce in fluid milk in violation of Section 1 of the Sherman Act (15 U. S. C. A. 1).

The averments of the indictment may be condensed and summarized as follows:

The city of Chicago, Illinois, has a population in excess of three and one-half million people. In excess of a million quarts of fluid milk are distributed and sold each day in the city of Chicago. The production of milk destined for ultimate distribution and sale as fluid milk in the city of Chicago, its transportation to the city, its preparation for distribution and sale within the city, and its distribution and sale within the city are regulated by an ordinance 167 of the city of Chicago and by rules and regulations promulgated by the Board of Health. Under the ordinance and under the regulations of the Board of Health, fluid milk distributed and sold in the city of Chicago must be produced on a dairy farm approved by the Board of Health. Such dairy farm is known as an approved dairy farm.

In the states of Illinois, Indiana, Michigan, and Wisconsin there are more than fifteen thousand approved dairy farms. More than fifty per cent of the approved dairy farms are located in states other than Illinois. Of the fluid milk produced on approved dairy farms, approximately forty per cent is produced on approved dairy farms in Indiana, Michigan, and Wisconsin.

Fluid milk produced on approved dairy farms is transported to Chicago in two ways:

(a) From approved dairy farms to country stations where it is commingled and combined with fluid milk from other approved dairy farms and thereafter transported from the country stations to Chicago by motor vehicle or by railroad; and

(b) Directly from approved farms by motor vehicle.

Fluid milk by its nature is perishable. It cannot be stored and it must reach the consumer within a short time after its production.

Pursuant to the ordinance of the city of Chicago and to the 168 rules and regulations of the Board of Health, all fluid milk transported to Chicago for sale and distribution therein must be delivered daily to a place, premise, or establishment where milk is collected preparatory to pasteurization elsewhere, or to a pasteurization plant where milk is handled or otherwise prepared for distribution and sale as fluid milk.

More than one hundred twenty-five distributors, some of whom are made defendants under the designation "major distributors," purchase fluid milk from producers for distribution and sale in the city of Chicago. The major distributors commingle the fluid milk from Indiana, Michigan, and Wisconsin, with milk produced in Illinois and then sell the commingled milk in Chicago as one product.

The individual defendants, except a police officer of the city of Chicago, the officers of the Chicago Board of Health, and two arbitrators, are associated with or employed by the corporation and association defendants.

Each of the major distributors is an Illinois corporation engaged in the sale and distribution of fluid milk in the city of Chicago. Approximately sixty-five per cent of the fluid milk sold in the city of Chicago is sold by the major distributors. All major distributors



maintain country stations in states outside of Illinois, receive fluid milk at such country stations, and transport it to Chicago.

169 The Associated Milk Dealers, Inc. is an Illinois corporation. Substantially all the members of the Associated Milk Dealers, Inc. are distributors doing business in the city of Chicago. The major distributors dominate and control its activities.

The Pure Milk Association is a corporation organized under "The Cooperative Marketing Act" of Illinois. It has a membership in excess of twelve thousand producers, approximately fifty per cent of whom are located outside of Illinois.

It is constituted the sole and exclusive agent for marketing the milk of its members. In excess of eighty per cent of the milk produced by its members is produced on approved dairy farms, seventy-five per cent of which is purchased by the major distributors.

The Milk Dealers Bottle Exchange is an Illinois Corporation. The major distributors own in excess of eighty per cent of its outstanding capital stock and dominate and control its activities and business. It is engaged in collecting, exchanging, and distributing milk bottles, cans, and other containers used by distributors. Special discounts are allowed to stockholders which are not allowed to non-stockholders on charges for services rendered.

The Milk Wagon Drivers Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America is a voluntary unincorporated association and is affiliated with the American Federation of Labor. Its members are employed by distributors in connection with the distribution and sale of fluid milk in the city of Chicago. Approximately seventy-five per cent of all its employed members are employed by the major distributors.

Daniel A. Gilbert is a public officer of the city of Chicago.

The officers of the Board of Health are charged with the administration of the milk ordinance of the city of Chicago and the rules and regulations promulgated thereunder.

The two arbitrators were members of an arbitration board which arbitrated a dispute between the major distributors and the Pure Milk Association.

The indictment charges that commencing in the month of January 1935, and continuously thereafter until the presentation of the indictment, the defendants engaged in an unlawful conspiracy in restraint of trade and commerce in fluid milk among the several states.

#### COUNT ONE

Count one charges a conspiracy—  
 "to arbitrarily fix, maintain, and control artificial and non-competitive prices to be paid to all producers by all distributors for all fluid milk produced on approved dairy farms located in the states of Illinois, Indiana, Michigan, and Wisconsin,"  
 and shipped to Chicago.

171 The means and methods whereby the conspiracy was intended to be effected are set forth at length. It is necessary to state only the general scheme. The major distributors, the Pure Milk Association and the Associated Milk Dealers, fixed and agreed upon uniform terms and conditions for the purchase of fluid milk from the Pure Milk Association, including price provisions. Through price letters and a monthly periodical, the Pure Milk Association fixed the prices to be paid for fluid milk by all independent distributors to independent producers. The arbitrator defendants sat on a board of arbitration which arbitrated a dispute between the Pure Milk Association and the major distributors. The Bottle Exchange discriminated against distributors who refused to purchase fluid milk at the prices thus fixed. Local 753, its adviser and the police officer, by threats, intimidation, and acts of violence interfered with the business of independent distributors. The Board of Health defendants gave preferential treatment to member-producers and discriminated against independent producers. The gravamen of the offense charged in this count is the fixing, maintaining, and controlling of prices to be paid fluid milk producers.

#### COUNT TWO

Count two charges a conspiracy—

172 "to fix and maintain by common and concerted action, uniform, arbitrary, and noncompetitive prices for the sale by the distributors in the city of Chicago of fluid milk shipped into the said City from the states of Illinois, Indiana, Michigan, and Wisconsin."

Again the means and methods are set forth at length. The major distributors, the Pure Milk Association and the Associated Milk Dealers, agreed and fixed upon uniform, arbitrary, and noncompetitive prices to be exacted from and paid to the purchasers of fluid milk. This agreement was executed by the major distributors. Its effect was to compel independent distributors to exact a like price from their customers. The Pure Milk Association refused to sell fluid milk to distributors who would not maintain the fixed price. Substantially the same allegation is made as to the arbitrator defendants as is made in Count one. The Bottle Exchange discriminated against distributors who refused to maintain the fixed price. Local 753, its adviser and the police officer, interfered by threats, intimidation, and violence with independent distributors not conforming to the fixed price standard. The Board of Health defendants gave preferential treatment to producers who sold to distributors maintaining the fixed prices and imposed unreasonable burdens on distributors who refused conformity.

The gravamen of the offense charged in this count is the fixing and maintaining of prices at which fluid milk is sold in Chicago.

## COUNT THREE

Count three charges a conspiracy

(a) "to hinder and to prevent prospective and independent distributors from engaging in the business of distributing fluid milk in the city of Chicago;

(b) "to hinder and to prevent existing independent distributors from distributing fluid milk in the city of Chicago in competition with the major distributors;

(c) "to hinder and to prevent the distribution of fluid milk to stores and by stores in the city of Chicago; and

(d) "to hinder and to prevent any distribution of fluid milk in the city of Chicago, except by the method and in the manner determined by said defendants."

Likewise the means and methods are set forth somewhat at length. The major distributors refrained from competing with each other for customer accounts; refused a stop served by any other distributor unless allowed to serve such stop exclusively; and by means of cash payments, loans, gifts, special discounts, and other securities obtained the privilege of serving stops exclusively. The Associated Milk Dealers adopted and enforced a rule requiring independent distributors to refrain from taking stops of major distributors. The Pure Milk Association refused to sell fluid milk to independent distributors who attempted to take the stops of major distributors and did other things to hinder the business of independent distributors. The arbitrator defendants rendered the arbitration award hereinbefore referred to. The Milk Dealers Bottle Exchange delayed the return of bottles of independent distributors and refused to sell independent distributors corporate stock. Local 753, its adviser  
174 and the police officer, by a series of threats, coercion, and violence hindered and delayed independent distributors in their business of distributing fluid milk in the city of Chicago. The Board of Health defendants, acting arbitrarily, imposed onerous burdens on the distribution of fluid milk in the city of Chicago by independent distributors.

The gravamen of the offense charged in this count is the determination and control of the distribution of fluid milk in Chicago.

## COUNT FOUR

Count four charges a conspiracy—

"to restrict, limit, and control and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce into the city of Chicago from the states of Illinois, Indiana, Michigan, and Wisconsin."

As in the other counts means and methods whereby the conspiracy charged as to be effected are set forth. The Pure Milk Association enforced a base surplus plan of production by which it limited the total production of fluid milk by member producers and did other

incidental acts to enforce the base surplus plan. The major distributors entered into agreements with the Pure Milk Association whereby the base surplus plan might be effected. The arbitrator defendants did the acts hereinbefore referred to. The Associated Milk Dealers

acted in concert with the Pure Milk Association to enforce the base surplus plan. The Bottle Exchange delayed and refused to return milk bottles and containers to independent distributors who refused to sell their milk through the Pure Milk Association.

Local 753, their adviser and the police officer, by threats, intimidation, and coercive measures, exerted their influence against independent distributors to carry out the base surplus plan. The Board of Health defendants gave preferential treatment and imposed arbitrary burdens upon independent producers. The count further states that

"the said base-surplus plan of payment was intended to and does restrict, limit, and control, restrain, and obstruct the supply of fluid milk entering the city of Chicago by arbitrarily limiting the quantity of fluid milk for which a member-producer may be paid at base price."

The gravamen of the offense charged in this count is the control of the supply of fluid milk permitted to be brought to Chicago.

As ground for motion to quash the indictment, most of the defendants contend that the indictment having been returned at the October 1938 term of court, was returned by an illegal and invalid grand jury.

The facts upon which this contention is made are as follows:

The terms for the District Court of this Division are fixed by statute to be held on the first Mondays in February, March, April, May, June, July, September, October, and November, and the third Monday in December (28 U. S. C. A. 152).

The grand jury that returned the indictment was impaneled and sworn at the July 1938 term of this court. On August 31, 1938, the grand jury appeared as a body in open court before Judge Woodward and presented a petition praying for an order authorizing the grand jury to sit during the September Term

"to finish investigations begun but not finished by the said July 1938 grand jury and which said investigation cannot be finished during the said July 1938 grand jury term of court."

On the same day Judge Woodward entered an order, based upon such petition, authorizing the July 1938 grand jury

"to sit during the September Term for the purpose of finishing said investigations."

Near the close of the September 1938 term it became apparent to the grand jury that they could not complete their labors during that term, the grand jury appeared as a body in open court before Judge Wilkerson praying for an order authorizing them to sit during the October 1938 term. Acting on that petition Judge Wilkerson, during the September Term, entered an order authorizing the grand jury



"to continue to sit during the October 1938 term of court for the purpose of finishing said investigations."

The applicable statute reads as follows:

"A district judge may, upon request of the district attorney  
177 or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than three terms" (28 U. S. C. A. 421).

Under the authority of this statute the grand jury can sit for a total of three terms of court. The limitations upon this right are that (a) a grand jury can be continued beyond its original term solely to finish investigations begun but not finished during the term for which it was authorized to sit, and (b) the continuance granted by the court can be only for one term at a time. The petitions and orders are clearly within the statute. The grand jury was a lawful grand jury and had full authority to return the indictment in this case.

Some hyper-critical objections are made as to the form of the order, but these objections are without merit.

The motion to quash the purported service of process upon Borden-Wieland, Inc., must be allowed. It appears that a corporation known as Borden-Wieland, Inc., was organized under the laws of Delaware. On January 4, 1936, Borden-Wieland, Inc., together with other corporations, was merged into a corporation known as Borden's Dairy Products Company, Inc. Thereafter all of the assets of Borden's

Dairy Products Company, Inc., were transferred to The  
178 Borden Company, a New Jersey Corporation. On February 11, 1936, Borden's Dairy Products Company, Inc., was dissolved. Borden's Dairy Products Company, Inc., is not a defendant. The merger was effected under the corporation law of Delaware which, by Section 60, provides in part:

"When an agreement shall have been signed, acknowledged, filed and recorded \* \* \* for all purposes of the laws of the State, the separate existence of all the constituent corporations parties to said agreement, or all of such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease \* \* \*"

The effect of this section of the act is to terminate the separate existence of all the constituent merging corporations, except the one into which they have been merged. Title Guaranty Loan & Trust Co. v. Alabama By-Products Corp., 214 Ala. 486; Greaser v. Phoenix Finance Co., 218 Ia. 1112.

Under this statute the existence of Borden-Wieland, Inc., was terminated on the date of the merger, namely, January 4, 1936. The corporate existence of Borden-Wieland, Inc., having ceased on January 4, 1936, this court cannot obtain jurisdiction over it by service of process on its purported assistant secretary.

Counts I, II, and IV may be considered together. These counts deal with the relationship between the producer and distributor of fluid milk. That relationship is the only basis upon which the government predicates the theory that interstate commerce in fluid milk exists whereby a conspiracy under the Sherman Act may be charged. In substance these counts charge that the defendants engaged in a combination and conspiracy to restrain trade and commerce in fluid milk among the several states (1) by fixing and maintaining prices to be paid to producers; (2) by fixing and maintaining prices to be charged by distributors to consumers; and (3) by restraining, limiting, and controlling the supply of fluid milk moving in interstate commerce by means of what is known as the base surplus plan. Price fixing is the essence of these counts.

The basic act is the Sherman Act under which this prosecution is sought to be maintained. The Sherman Act forbids noncompetitive control of prices in interstate commerce, without regard to the desirability of price stability, or the intent of the parties, or the benefit to the public, or the reasonableness of the price fixed.

The Sherman Act has been in force nearly fifty years. During that time sweeping changes in the nation's social and economic problems have been wrought. These changing social and economic problems are reflected in the statute law, both national and state. The Sherman Act embodies the philosophy of individualism and unrestrained competition. Statutory law, since the enactment of the Sherman Act, reflects a change in the fundamental concept on which the Sherman Act is based. The tendency of later legislation has embodied the philosophy of collectivism and control of harmful competition. With the relative wisdom of these essentially incompatible philosophies, the courts have no concern. It is the duty and concern of the courts to construe and apply the applicable constitutional enactments of the political branch of the government.

The first act which makes a departure from, or an exception to, the Sherman Act was the Clayton Act of October 15, 1914 (15 U. S. C. A. 17). By that act labor, agricultural or horticultural cooperative organizations were excepted from the broad and sweeping terms of the Sherman Act. Such cooperative organizations, in and of themselves, were not to be construed as illegal combinations or conspiracies in restraint of trade under the antitrust laws.

The next radical departure from the theory of the Sherman Act was the Capper-Volstead Act of February 18, 1922 (7 U. S. C. A. 291). This act legalizes price fixing for those within its purview. To that extent it modifies the Sherman Act. It removes from the Sherman Act those organizations, cooperative in their nature, which come within the purview of the Capper-Volstead Act. Prior to the Capper-Volstead Act farmers were treated no differently than others under the antitrust laws, so far as price fixing was concerned.

This act goes much further than section 6 of the Clayton Act. It is much broader in scope. The Capper-Volstead Act legitimizes, for agricultural cooperative associations, specified powers and purposes. It provides that associations, qualified

under its terms, may process, prepare for market, handle and market in interstate and foreign commerce the products of their members; that they may have marketing agencies in common and that they may make the necessary contracts and agreements to carry out such purposes.

Section 2 (7 U. S. C. A. 292) recognizes that cooperative associations, in the exercise of the powers conferred upon them by section 1, may monopolize or restrain interstate trade. It confers upon the Secretary of Agriculture the power, after complaint, notice, and hearing, to issue a "cease and desist" order when he finds that "the price of any agricultural product is unduly enhanced by reason" of such association monopolizing or restraining trade in interstate or foreign commerce.

The Capper-Voilestead Act does not condemn any kind of monopoly or restraint of trade, or any price fixing, unless such monopoly or price fixing unduly enhances the price of an agricultural product. The Act then, by section 2 thereof, commits to an officer of the executive department, the Secretary of Agriculture, the power of regulation and visitation.

Under this act farmers are favored under the antitrust laws in that they are given a qualified right, free from any criminal liability, to combine among themselves to monopolize and restrain interstate trade and commerce in farm products and to fix and enhance the price thereof.

182. This is the first statute to which the attention of the court has been called which, with reference to farmer's cooperatives, embodies the theory of executive regulation and control of price or profit. The theory and philosophy of unrestrained competition is departed from and, in its stead, is substituted the theory of governmental regulation of combinations and prices. The control is vested in the Secretary of Agriculture, subject, however, under Section 2, to review by the courts. The court deduces from the Capper-Voilestead Act that the Secretary of Agriculture has exclusive jurisdiction to determine and order, in the first instance, whether or not farmer cooperatives, in their operation, monopolize and restrain interstate trade and commerce "to such an extent that the price of any agricultural product is unduly enhanced."

Until the Secretary of Agriculture acts, the judicial power cannot be invoked.

The Cooperative Marketing Act of July 2, 1926 (7 U. S. C. A. 455), in this connection, is not of particular significance. It was probably declaratory of the law as it existed in that cooperative organizations were authorized to control and disseminate crop, marketing, statistical, and economic information. However, it does show a closer and more intimate contact with the government in that the government through the Farm Credit Administration in the Department of Agriculture was created for the purpose of acting as a clearing house for cooperatives.

183 The Agricultural Adjustment Act of May 12, 1933, known as A. A. A. (48 Stat. 31; 7 U. S. C. A. 601 et seq.), together with its amendment of August 24, 1935 (c. 641, 49 Stat. 750), and the Agricultural Marketing Agreement Act of June 3, 1937 (Ch. 296, 50 Stat. 246) witnessed the most marked departure from the theory of the Sherman Act.

The Agricultural Adjustment Act of 1933, in some of its material features, was held invalid in the case of *United States v. Butler*, 297 U. S. 1. The decision in this case affected only the production control and the processing-tax provisions of the act of 1933. The act of 1933, as amended in 1935, contained provisions relative to the marketing of agricultural products. The decision in the *Butler* case, *supra*, cast some doubt on the validity of the marketing provisions of the several acts. To cure the infirmities, if any, in the marketing provisions of the Agricultural Adjustment Act, the Congress enacted into separate legislation the marketing and order provisions of the Agricultural Adjustment Act. The Congress, therefore, by the act of June 3, 1937, enacted the Agricultural Marketing Agreement Act (Ch. 296, 50 Stat., p. 246). It reenacted, affirmed, and validated, without material change, the provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. The Agricultural Marketing Agreement Act has been held valid in the cases of *U. S. v. Rock Royal Co-Operative, Inc.*, and *H. P. Hood & Sons, Inc., v. U. S. et al.*, by opinions of the Supreme Court handed down June 5, 1939.

The original Agricultural Adjustment Act (48 Stat. 31) was passed by Congress to relieve the then economic depression in the basic industry of agriculture. The act was preceded by a declaration of emergency in which it was recited that the normal currents of commerce in agricultural commodities have been burdened and obstructed by the severe disparity between the prices of agricultural commodities and the prices of industrial products, which disparity has resulted in the substantial destruction of the purchasing power of farmers for industrial products and the breaking down of the orderly exchange of all commodities. It therefore declared that "these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest."

The Agricultural Marketing Agreement Act (7 U. S. C. A. 601) makes substantially the same declaration, namely, that transactions in agricultural commodities affect "a national public interest." The Congress then proceeds, by the purview of the act which follows the declaration of emergency, to remedy this deplorable condition. The act provides in detail how the "national-public interest" in transactions affecting agricultural commodities shall be conserved, protected, and advanced.

Following the declaration of emergency and a statement of the conditions confronting agriculture and industry, the policy which was intended to be effected, the end to be accomplished, 183 is stated clearly and succinctly:



"To establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period" (7 U. S. C. A. 602 (1)).

Another declared policy was that of protecting the interest of the consumer by

"approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (2) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive decline in domestic and foreign markets \* \* \*" (7 U. S. C. A. 602 (2)).

The declared policy of Congress, therefore, was directed towards the protection and stabilization of transactions in agricultural commodities. In construing and applying the Agricultural Adjustment Act, as amended, and the Agricultural Marketing Agreement Act, the policy of Congress, as stated both in the declaration of emergency and in the declaration of policy, must constantly be borne in mind.

This express policy of the Congress was intended to be put into practical execution. Its practical execution was to be had  
186. "through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter" (7 U. S. C. A. 602 (1)).

The base period for agricultural commodities, with exceptions not here material

"shall be the pre-war period, August 1909—July 1914" (7 U. S. C. A. 602 (1)).

In order to execute the declared policy of the act, the Secretary of Agriculture is vested with power to enter into marketing agreements. The statute reads:

"In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful \* \* \*" (7 U. S. C. A. 608b).

Not only is the Secretary of Agriculture vested with power to enter into marketing agreements with producers and handlers, but also he is charged with the mandatory duty, under given circumstances, to enter orders (7 U. S. C. A. 608c (1)).

The statute reads:

187 "The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section". (7 U. S. C. A. 608c (1)).

Among other commodities to which orders "shall be applicable," is milk (7 U. S. C. A. 608c (2)).

It will be noted that the Secretary of Agriculture is empowered to enter into marketing agreements, but that he is required to enter orders (7 U. S. C. A. 608b and 608c (1)).

The object of the order is that of regulation of the handling of agricultural commodities which are in interstate commerce. Again, a mandatory duty is imposed on the Secretary of Agriculture. The statute says that the "orders shall regulate," the limitation being that the orders shall apply only to interstate or foreign commerce. The statute reads:

"Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof." (7 U. S. C. A. 608c (1)).

Before an order can be issued, preliminary steps must be taken. There must be notice and an opportunity for a hearing (7 U. S. C. A. 608c (3)). There must be a finding by the Secretary of Agriculture, based upon evidence introduced at such hearing,

188 "that the issuance of such order and all the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity \* \* \*" (7 U. S. C. A. 608c (4)).

Where an order is issued with a marketing agreement, it does not become effective until the handlers of not less than fifty percent of the volume of the commodity within the area of the order have signed the marketing agreement, and does not become effective until approved by at least two-thirds of the producers by number, or by producers who have produced for market at least two-thirds of the volume of such commodity (7 U. S. C. A. 608c (8)). The approval by a cooperative agency is considered the approval of its members (7 U. S. C. A. 608c (12)). However, an order may become effective notwithstanding its disapproval by the handlers if the Secretary of Agriculture, with the approval of the President, determines (1) that the failure of the handlers to sign the marketing agreement "tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product";

(2) that the issuing of such order is the only practical means of advancing the interests of the producers of such commodity and is approved or favored (a) by two-thirds of the producers, or (b) by producers who have produced two-thirds of the volume of the commodity (7 U. S. C. A. 608c (9) (A) (B)).

189 If a handler feels that an order is not in accordance with law, he is entitled, on petition, to a hearing by the Secretary of Agriculture, after which the Secretary of Agriculture must make a ruling

"which shall be final, if in accordance with law" (7 U. S. C. A. 608c (15) (A)).

This order is subject to judicial review (7 U. S. C. A. 608c (16) (B)).

Orders are required to contain one or more of the following terms and conditions: (1) prohibiting unfair methods of competition and unfair trade practices, (2) providing for the selection of an agency which shall have the power (a) to administer the order; (b) to make rules and regulations to carry out the order; (c) to investigate complaints or violations, and (d) to recommend amendments (7 U. S. C. A. 608c (7)).

In the case of milk and its products, special terms and conditions must be contained in the order. These terms and conditions are set forth quite at length. A recital of such terms and conditions is not pertinent to the inquiry before this court, and hence the court contents itself with a mere reference to the statute (7 U. S. C. A. 608c (5)).

Jurisdiction is given to the District Court

"to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter" (7 U. S. C. A. 608a (6)).

190 Provision is also made for a criminal prosecution against a handler who violates the provision of any order (7 U. S. C. A. 608c (14)).

Provision is further made whereby the Secretary of Agriculture may terminate or suspend the operation of an order. The wording of the statute is

"The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof" (7 U. S. C. A. 608c (16) (A)).

Section 611 (7 U. S. C. A. 611) declares the conditions upon which any product shall be excluded from the operations of the law. In order to remove the marketing of any such agricultural products from the operations of the law, the Secretary must first institute an investigation. He must give notice and an opportunity for interested parties to be heard. If, after such investigation, notice, and hearing, he concludes that the conditions of production, mar-

keting, and consumption are such that, during any period, the law cannot be effectively administered to the end of effectuating the declared policy with respect to such commodity, then

"the Secretary of Agriculture shall exclude from the operation of the provisions of this chapter, during any period, any such commodity \* \* \*."

This section contains the only provision whereby the marketing 191 of any basic agricultural commodity, including milk, may be exempted from the jurisdiction and control of the Secretary of Agriculture. Until the Secretary invokes the power of investigation, notice, and hearing, conferred upon him by this section, the basic agricultural commodity, so far as the marketing thereof is concerned, remains where the statute puts it, namely, in the Secretary of Agriculture.

The Agricultural Marketing Agreement Act was designed to improve the marketing of agricultural products, including milk, under the supervision and regulation of the Department of Agriculture. The act is wider in content than the Capper-Volstead Act. It extends to both distributors and producers. It placed both producers and distributors of agricultural products, including milk, under the exclusive control of the Secretary of Agriculture.

Vast powers were conferred upon the Secretary of Agriculture with relation to the production, distribution, and marketing of agricultural products, including milk. The theory of the act is to improve the condition of agriculture throughout the United States under the supervision, direction, and regulation of the Secretary of Agriculture. To attain this end powers commensurate with his duty and responsibility are vested in the Secretary. Under the Agricultural Marketing Agreement Act of June 3, 1937, the Secretary of Agriculture is vested with full and plenary power to enter into marketing agreements with both the producers, 192 handlers, and distributors of agricultural products.

A study of the statutory policy from the Sherman Act of 1890 to the Agricultural Marketing Agreement Act of 1937 shows a constant and growing tendency on the part of Congress to control and regulate the production and marketing of agricultural products, including milk, through the administrative agency of the Secretary of Agriculture. The whole theory and policy of the Agricultural Marketing Agreement Act is that of governmental control, regulation, and supervision. The production and marketing of agricultural products, including milk, has, so far as interstate commerce is concerned, been removed from the sphere of trade and barter in a free agency to a status of dependence and obedience to the supreme, exclusive, and plenary control of the Secretary of Agriculture, subject to judicial review in the mode prescribed by the statute.

The Court holds that, by the Agricultural Marketing Agreement Act the Congress has committed to the Executive Department, acting



through the Secretary of Agriculture, full, complete, and plenary power over the production and marketing, in interstate commerce, of agricultural products, including milk.

193 To what extent he should act, the quantum of regulation, is solely one for his judgment and decision. If conditions require, he must act; if they do not require action, then all marketing conditions are deemed satisfactory and the purpose of the act is effectuated. Nonaction by the Secretary of Agriculture, in any given marketing area, is equivalent to a declaration that the policy of the act, in that area, is being carried out. If the policy of the act, in any given milk area, is being violated it becomes the duty of the Secretary of Agriculture to intervene and invoke the powers conferred upon him by the act.

It results, from what has been said, that the power of regulation, supervision, and control of the milk industry, in any given milk shed, is, by the Agricultural Marketing Agreement Act of 1937, vested exclusively in the Secretary of Agriculture. It follows further that the Secretary of Agriculture cannot by his own action, or inaction, divest himself of this power so long as the statute remains in force. The marketing of the agricultural products, including milk, covered by the Agricultural Marketing Agreement Act, is removed from the purview of the Sherman Act. In other words, so far as the marketing of agricultural commodities, including milk, is concerned, no indictment will lie under section 1 of the Sherman Act.

194 The question of whether or not the indictment charges that the combination and conspiracy restrained trade and commerce in fluid milk among the several states has been extensively and ably argued on both sides, the government contending that the averments of the indictment plainly charge a combination and conspiracy in restraint of interstate commerce and the defendants contending that the indictment, properly analyzed and considered, fails to charge a combination and conspiracy in restraint of interstate commerce. It will be perceived, however, from what has been stated, that as to Counts one, two, and four of the indictment it is unnecessary to decide whether or not the allegations of the indictment show that interstate commerce was or was not restrained. If the marketing of milk in the Chicago milk shed burdens, obstructs, or affects interstate commerce in fluid milk, then, as above concluded, the merchandising thereof was subject to the plenary and exclusive control of the Secretary of Agriculture through marketing agreements or orders made pursuant to the Agricultural Marketing Agreement Act. If, on the other hand, the acts charged in the indictment do not burden, obstruct, or affect interstate commerce in fluid milk, then plainly no offense under the Sherman Act has been charged under Counts one, two, and four.

195 The demurrers to Counts one, two, and four must, therefore, be sustained.

The averments of Count three have hereinbefore been set forth.

This count charges at least four separate, different, and independent conspiracies or combinations. This is not a case of one conspiracy accomplished by several acts; it is several independent conspiracies. Each of the conspiracies affects different individuals or affects the same individuals in entirely different situations.

It is one thing to hinder and prevent prospective independent distributors from engaging in the business of distributing fluid milk. It is entirely different to hinder and prevent existing independent distributors from distributing fluid milk in Chicago in competition with the major distributors. To hinder and prevent distribution of fluid milk to stores and by stores in the city of Chicago is different from any conspiracy previously charged in this count. To hinder and prevent any distribution of fluid milk in the city of Chicago, except by the method and in the manner determined by said defendants, is also conspiracy sharply differentiated from the three conspiracies previously charged in this indictment.

This count is challenged as bad for duplicity. The Court believes the challenge to be well taken and holds that the count charges at least four distinct and separate conspiracies, and not a single conspiracy.

196 Moreover, this count deals with "independent distributors" and stores. It is also challenged on the ground that the supposed restraints therein described do not affect any interstate commerce. The indictment alleges generally the origin of fluid milk transported into Chicago from Illinois, Indiana, Michigan, and Wisconsin. It further alleges that all the major distributors have country stations outside of Illinois and transport, or cause to be transported, milk received in such stations to Chicago. The indictment is lacking as to averments or allegations as to the origin of fluid milk sold by stores or independent distributors. It is only by intendment and inference that the Court could conclude from an examination of the indictment that the conspiracy charged in Count three had any effect on interstate commerce. It is only by such intendment and inference that the Court could conclude that the stores and independent distributors whose system of distribution the defendants are alleged to have controlled, sold fluid milk which was or had been the subject of interstate commerce. It is a fundamental of criminal pleading that an indictment must allege directly and with certainty every essential element or ingredient of the offense. If any essential element or ingredient of the crime is omitted, such omission cannot be supplied by intendment or implication. (Pettibone v. U. S., 148 U. S. 197; U. S. v. Carney, 228 Fed. 163.)

The demurrer to Count three, therefore, must be sustained.

No. 31197

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

THE BORDEN COMPANY ET AL., DEFENDANTS

*Order and judgment on demurrers and motions to quash filed by the  
several defendants, as shown of record*

July 28, 1939

An indictment in the above-entitled cause having been returned by a grand jury in the District Court of the United States of America for the Northern District of Illinois, Eastern Division, on November 1, 1938, charging each of the defendants hereinafter named with a violation of Title 15, U. S. C. A., Section 1, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and the defendant Borden-Wieland, Inc., having moved to quash service of summons, and the defendants The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A.

Wentworth having jointly and severally demurred to and  
199 moved to quash the said indictment, and the defendants Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi having demurred to the said indictment, and the defendants Hunding Dairy Company and Carl W. Hunding having demurred to and moved to quash the said indictment, and the defendants Capital Dairy Company and Hyman I. Freed having demurred to and moved to quash the said indictment, and the defendant Sidney Wanzer & Sons, Inc., having demurred to the said indictment, and the defendant H. Stanley Wanzer having demurred to the said indictment and the defendant Gordon B. Wanzer having demurred to the said indictment, and the defendant International Dairy Company having demurred to the said indictment, and the defendant Louis Janata having demurred to the said indictment, and the defendant Western-United Dairy Company having demurred to the said indictment, and the defendant Western Dairy Company, Inc., having demurred to the said indictment, and the defendant United Dairy Company having demurred to the said indictment, and the defendant Louis G. Glick having demurred to the said indictment, and the defendant Maurice S. Dick having demurred to the said indictment, and the defendant Samuel S. Dick having demurred to the said indictment, and the  
200 defendant Milk Dealers Bottle Exchange having demurred to the said indictment, and the defendants Associated Milk Dealers, Inc., Paul Potter, and Otto Black having jointly and

severally demurred to and moved to quash the said indictment, and the defendants Milk Wagon Driver's Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, and David A. Riskind having demurred to the said indictment, and the defendant Leslie G. Goudie having demurred to and moved to quash the said indictment, and the defendant Daniel A. Gilbert having demurred to the said indictment, and the defendants Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case having demurred to and moved to quash the said indictment, and the defendant Leland Spencer having demurred to and moved to quash the said indictment, and the defendants Herman N. Bundesen, Paul Krueger, and William Guerin having demurred to said indictment, and each of the above-named defendants having filed written briefs and points of authorities on the various legal questions involved, and this matter having come on regularly to be heard on June 7 and 8, 1939, at the regular term of the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

Now, after hearing the oral arguments of counsel for the several defendants in support of said motions to quash and demurrers, and the oral argument of Leo F. Tierney, Esquire, Special Assistant to the Attorney General, in opposition thereto, and being fully advised in the premises, the Court finds that certain objections made to the indictment are well taken and should be sustained.

Accordingly, it is hereby ordered and adjudged:

First, that paragraph 5 of each of the separate demurrers of the defendants Sidney Wanzer & Sons, Inc., H. Stanley Wanzer, Gordon B. Wanzer, International Dairy Company, Louis Janata, Western-United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, and Milk Dealers Bottle Exchange, and that paragraph 26 of the separate demurrer of the defendant Leland Spencer, and that paragraph 14 of the joint and several demurrers and motion to quash of the defendants Associated Milk Dealers, Inc., Paul Potter, and Otto Black, and that paragraph 5 of the separate demurrers of the defendants Herman N. Bundesen, Paul Krueger, and William Guerin, be, and the same hereby are, sustained as to Counts One, Two, and Four of the above mentioned indictment on the ground that no indictment will lie under Section 1 of the Sherman Act, Title 15, U. S. C. A., Section 1 (Act of July 2, 1890, 26 Stat. 209), with respect to the production and marketing of agricultural products, including milk, because the production and marketing of agricultural products are removed from the purview of the Sherman Act of 1890, Title 15, U. S. C. A., Section 1 (Act of July 2, 1890, 26 Stat. 209), by the Act of May 12, 1933 (48 Stat. 31), as amended August



24, 1935 (49 Stat. 750, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), 7 U. S. C. A., Supp. IV, par. 601 et seq.

Second, that paragraph 10 of the joint and several demurrers of Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case, be, and the same hereby are, sustained as to Counts One, Two, Three, and Four of the above-mentioned indictment on the ground that no indictment will lie under Section 1 of the Sherman Act, Title 203 15, U. S. C. A., Section 1 (Act of July 2, 1890, 26 Stat. 209).

with respect to the production and marketing of agricultural products, including milk, because Section 6 of the Clayton Act (Act of October 15, 1914, 15 U. S. C. A. 17), Sections 1 and 2 of the Capper-Volstead Act (Act of February 15, 1922), 7 U. S. C. A., Section 291, and The Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended, August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), 7 U. S. C. A., Supp. IV, Par. 601 et seq. when properly construed exempt the Pure Milk Association, an agricultural cooperative association, together with its officers and agents, from prosecution under Section 1 of the Sherman Act of 1890 (Act of July 2, 1890, 26 Stat. 209).

Third, that paragraph 6 of the joint and several demurrer and motion to quash of the defendants The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth, and that paragraph 6 of the joint and several demurrer and motion to quash of the defendants Bowman Dairy Company,

204 D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi, and that paragraphs 8 and 9 of each of the separate demurrers of the defendants Sidney Wanzer & Sons, Inc., H. Stanley Wanzer, Gordon B. Wanzer, International Dairy Company, Louis Janata, Western United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, and Milk Dealers Bottle Exchange, and that paragraphs 18 and 19 of the joint and several demurrer and motion to quash of the defendants Associated Milk Dealers, Inc., Paul Potter, and Otto Black, and that paragraph 1 of the joint and several demurrer of the defendants Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, and David A. Riskind, and that paragraph 8 of the joint and several demurrer of Herman N. Bundesen, Paul Krueger, and William J. Guerin, and that paragraph 30 of the separate demurrer of the defendant Leland Spencer, be, and the same hereby are sustained as to Count Three of the above mentioned indictment on the ground that said Count charges at least four separate and distinct conspiracies and is therefore bad for duplicity;

205 Fourth, that paragraph 8 of the joint and several demurrer and motion to quash of the defendants The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth; and paragraph 8 (b) of the joint and several demurrer and motion to quash of the defendants, Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi, and paragraph 5 of the joint and several motion to quash and demurrer of the defendants Hunding Dairy Company and Carl W. Hunding, and paragraph 7 of the joint and several motion to quash and demurrer of the defendants Capitol Dairy Company and Hyman I. Freed, and paragraph 8 (a) and (b) of the joint and several demurrer and motion to quash of the defendants Associated Milk Dealers, Inc., Paul Potter and Otto Black, and paragraph D (6) of the joint and several demurrer of the defendants Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, and David A. Riskind, and paragraph 5 of the separate demurrer and motion to quash, of the  
 206 defendant Leslie G. Goudie, and paragraph 6 of the separate demurrer of the defendant Daniel A. Gilbert, and paragraph 23 of the joint and several motion to quash and demurrer of the defendants Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case, and paragraph 6 of the separate demurrer of the defendant Leland Spencer, be, and the same hereby are, sustained as to Count Three on the ground that a restraint of interstate commerce is not definitely alleged in Count Three in that it is not definitely charged that the milk sold by stores and independent distributors was or had been the subject of interstate commerce;

Fifth, that the said motions to quash and demurrers be, and the same hereby are, overruled, pro forma:

(1) As to Counts One, Two, and Four, insofar as they challenge these Counts on the ground that interstate commerce was not involved;

(2) As to Counts One, Two, Three, and Four, insofar as they challenge the constitutionality of the Sherman Act of 1890, Title 15, U. S. C. A., Section 1;

207 (3) As to Counts One, Two, Three, and Four, insofar as they challenge the sufficiency of the allegation of unlawful conspiracy;

(4) As to Counts One, Two, Three, and Four, each and every other ground of demurrer and motion to quash filed by the defendants herein, not herein specifically overruled or sustained;

Sixth, that the said motion to quash the service of process upon Borden-Wieland, Inc., be, and the same hereby is granted on the ground that, under Section 60 of the Corporation Law of Delaware, Borden-Wieland, Inc., ceased to exist on January 4, 1936;

Seventh, that the several motions to quash the indictment herein upon the ground that the same was returned by an invalid and illegal grand jury are hereby overruled.

208 It is therefore ordered that the service of process upon Borden-Wieland, Inc., be, and the same hereby is quashed and set aside;

It is therefore ordered that the indictment be, and the same hereby is dismissed as to all defendants.

It is further ordered that the opinion of the Court rendered and filed herein with the Clerk of the District Court of the United States of America for the Northern District of Illinois, Eastern Division, on the 13th day of July, 1939, be made a part of the record in this cause;

It is further ordered that the United States of America and the several defendants are hereby allowed exceptions to this order and decision in so far as they are respectively aggrieved thereby.

Done in open court this 28th day of July 1939.

(Signed) CHARLES E. WOODWARD,  
District Judge.

211

In United States District Court

Title omitted.

*Praëcipe for transcript of record*

Filed August 17, 1939

*To The Clerk, United States District Court, Northern District of Illinois, Eastern Division:*

The appellant hereby directs that in preparing the transcript of the record in the above entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. Docket entries and minute entries showing return of indictment, filing of demurrers and motions to quash and entry of order and judgment sustaining demurrers and motions to quash.

2. Indictment.

3. Demurrers and motions to quash.

4. Opinion.

5. Order and judgment sustaining demurrers and motions to quash.

6. Petition for appeal to the Supreme Court of the United States

7. Statement of jurisdiction of the Supreme Court of the United States.

8. Assignment of errors.

9. Order allowing appeal.

10. Proof of service on appellees of petition for appeal, order allowing appeal, assignment of errors and statement as to jurisdiction.

- 212 11. Citation.,  
12. Praecipe.

(Signed) LEO F. TIERNEY,  
Leo F. Tierney,  
*Special Assistant to the Attorney General.*

(Signed) WILLIAM J. CAMPBELL,  
William J. Campbell,  
*United States Attorney,  
Northern District of Illinois, Eastern Division.*

- 214 [Citation in usual form filed August 17, 1939, omitted in printing.]

- 223 In United States District Court

[Title omitted.]

*Order denying motion for leave to amend appeal order*

August 28, 1939

This day comes the defendant Pure Milk Association et al. by its attorneys and enter their motion for leave to amend appeal order of August 17, A. D. 1939, by striking out "and Special Pleas in Bar" in first paragraph and also the same clause in the second paragraph, which motion is denied.

- 225 In United States District Court

[Title omitted.]

*Designation for additional portions of the record desired to be included by certain appellees*

Filed August 28, 1939

*To the clerk of the United States District Court, for the Northern District of Illinois, Eastern Division:*

Appellees, The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, W. A. Wentworth, Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Hunding Dairy Company, Carl W. Hunding, Capitol Dairy Company, Hyman I. Freed, Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, John P. Case, Leland Spencer, hereby direct that you prepare a complete transcript of the record in said cause, including therein, without limitation, the following portions of said



record in addition to those specified in the praecipe filed August 1939, by appellant:

1. Motion of defendants, The Borden Company, et al., filed August 27, 1939, including notice of said motion.

2. Motion of Pure Milk Association, et al., filed August 28, 1939, including notice of said motion.

3. Order of the Court entered August 28, 1939, disposing of said motions.

4. Bill of exceptions or stenographic report of proceedings on the hearing on said motions before Judge Charles E. Woodward on August 28, 1939, attached hereto.

5. This designation of additional portions of the record and proof of service thereof.

(Signed) Frederic Birnham, Donald F. McPherson, Cecil I. Crouse, Howard Neitzert (Attorneys for The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Simaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth); (signed) Louis E. Hart, Irving Herriott, L. Edward Hart, Jr. (Attorneys for Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson and J. F. Philippi); (signed) Charles S. Deneen, Roy Massena, Donald Schaffer (Attorneys for Hunding Dairy Company and Carl W. Hunding); (signed) Isadore Fried, Bernard A. Stol, Herbert B. Fried (Attorneys for Capitol Dairy Company and Hyman I. Freed); (signed) Schuyler & Hennessy, George Lennon, W. C. Graves & Martin Burns (Attorneys for Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case); (signed) Isham, Lincoln & Beale, Ben H. Matthews, James P. Dille (Attorney for Leland Spencer).

Received a copy of the above and foregoing designation for Additional Portions of the Record Desired to be Included by Certain Appellees this 28th day of August, A. D. 1939.

ROBERT H. JACKSON,  
By THOS. H. DALY,  
LEO F. TIERNEY,  
By THOS. H. DALY,  
WILLIAM J. CAMPBELL,

U. S. Atty.

227 [Transcript of proceedings on motion to amend order of August 17, 1939, allowing appeal to the United States of America omitted. Printed side page, 277 post.]

245 In United States District Court

[Title omitted.]

*Notice*

To ROBERT H. JACKSON, Esquire,  
*Solicitor General;*  
 LEO F. TIERNEY, Esquire,  
*Special Assistant to the Attorney General; and*  
 WILLIAM J. CAMPBELL, Esquire,  
*United States Attorney.*

Please take notice that on Monday, the 28th day of August 1939, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, we shall appear before his Honor, Judge Woodward, in the room usually occupied by him as a courtroom in the United States Court House, in the City of Chicago, State of Illinois, and shall then and there present the motion of certain defendants, a copy of which motion is handed to you with this notice, at which time and place you may appear if you see fit.

Dated: August 25th, 1939.

MAYER, MEYER, AUSTRIAN & PLATT,  
 SIDLEY, McPHERSON, AUSTIN & BURGESS,  
 MONTGOMERY, HART, PRITCHARD & HERIOTT,  
 DENEEN AND MASSENA,  
 ISIDORE FRIED,

*Attorneys for certain defendants.*

Received a copy of the above notice, together with a copy of the motion referred to therein, this 26th day of August, A. D. 1939.

(Signed) ROBERT H. JACKSON,  
 (Signed) LEO F. TIERNEY,  
 (Signed) WILLIAM J. CAMPBELL.

246 In United States District Court

[Title omitted.]

*Motion to amend order of August 17, 1939*

Filed August 28, 1939

Come now The Borden Company, Charles L. Dressel, Harry M. Reser, W. A. Baril, H. W. Comfort, S. M. Ross, O. O. Smaha, R. W. Sessler, F. A. Webb, W. A. Wentworth, Bowman Dairy Company, D. B. Peck, Francis H. Kuilman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Hunding Dairy Company, Carl W. Hunding, Capitol Dairy Company, and Hyman Freed, defendants in the above entitled cause, by their respective attorneys, and show to the Court:

1. That by the order made in this cause and dated the 17th day of August, 1939, it was ordered that an appeal be allowed to the United States of America from the order and judgment of this Court entered on July 28, 1939.

2. That said order of August 17, 1939, was entered ex parte by this Court and without notice to the defendants upon the petition of the United States of America.

3. That these defendants have been notified of the entry of the said order of August 17, 1939, and have duly examined such order and find that the same is erroneous in that it recites that certain special pleas in bar were filed by certain defendants and have been sustained, and further that it grants to the United States of America an appeal from an order and judgment sustaining certain special pleas in bar, whereas, in fact, no such special pleas in bar were filed by any defendants and the order and judgment entered in this cause on, to-wit, July 28, 1939, did not so sustain any special pleas in bar.

Whereof, these defendants move the Court that the said order of August 17, 1939 may be amended in the following manner:

(a) By striking out the words, "and special pleas in bar," in the sixth line of the first paragraph of said original order, after the words, "motions to quash."

(b) By striking out the words, "and the special pleas in bar," in the fourth line of the second paragraph of the said original order, after the words, "and motions of the defendants to quash the indictment."

Dated August 25, 1939.

(signed) Donald F. McPherson, (signed) Frederic Burnham, (signed) Cecil I. Crouse, (Attorneys for The Borden Company, Charles L. Dressel, Harry M. Reser, W. A. Baril, H. W. Comfort, S. M. Ross, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth); (signed) Louis E. Hart, (signed) Irving Herriott, (signed) L. Edward Hart, Jr. (Attorneys for Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi); (signed) Charles S. Deneen, (signed) Roy Massena, (signed) Donald N. Schaffer, (Attorneys for Hunding Dairy Company and Carl W. Hunding); (signed) Isidore Friedl, (signed) Bernard A. Stol, (signed) Herbert B. Friedl, (Attorneys for Capitol Dairy Company and Hyman Freed).

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In United States District Court

[Title omitted.]

Notice

To Honorable WILLIAM J. CAMPBELL, *United States Attorney, Federal Building, Chicago, Illinois.*

Honorable LEO F. TIERNEY, *Special Asst. Attorney General, 208 South La Salle Street, Chicago, Illinois.*

Please take notice that on Monday, the 28th day of August, A. D. 1939, at the hour of ten o'clock A. M., or as soon thereafter as coun-

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sel can be heard, the undersigned will appear before the Honorable Charles E. Woodward, Judge of the United States District Court, in the room usually occupied by him as a courtroom, in the United States Court House, at Chicago, Illinois, or before any other Judge who may be sitting in his place, and move the Court to amend the order of August 17, 1939, in accordance with our motion, copy of which is hereto attached.

SCHUYLER & HENNESSY.  
GEORGE W. LENNON.  
W. C. GRAVES.  
MARTIN BURNS.

CHICAGO, ILLINOIS, August 25, 1939.

Received a copy of the above and foregoing Notice this 26th day of August, A. D. 1939.

(Signed) WILLIAM J. CAMPBELL,  
*United States Attorney.*

(Signed) LEO F. TIERNEY,  
*Special Asst. Attorney General.*

251 In United States District Court

[Title omitted.]

*Notice to amend order of August 17, 1939*

Filed August 28, 1939

Come now Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case, defendants in the above entitled cause, each in their own proper person, by their undersigned attorneys, and show to the Court:

1. That by the order made in this cause and dated the 17th day of August 1939, it was ordered that an appeal be allowed to the United States of America from the order and judgment of this court entered on July 28, 1939.

2. Said order of August 17, 1939, was entered ex parte by this court and without notice to the defendants upon the petition of the United States of America.

3. Since the entry of said order of August 17, 1939, these defendants have discovered that there is an error in the said order in that it orders that an appeal be allowed to the United States of America from the order and judgment of this Court sustaining special pleas in bar interposed by the defendants, for the reason that the said order and judgment of this Court entered July 28, 1939, did not sustain any special pleas in bar interposed by the defendants in this cause.

Wherefore, these defendants move the Court that the said order of August 17, 1939, may be amended in the following manner:



124 UNITED STATES VS. THE BORDEN COMPANY ET AL

252 (a) By striking out the words, "and special pleas in bar," in the sixth line of the first paragraph of said original order, after the words, "motions to quash."

(b) By striking out the words, "and the special pleas in bar," in the fourth line of the second paragraph of the said original order, after the words, "and motions of the defendants to quash the indictment."

Dated August 25, 1939.

SCHUYLER E. HENNESSY,  
GEORGE W. LENNON,  
W. C. GRAVES,  
MARTIN BURNS.

273 In United States District Court

[Title omitted.]

*Order to strike from citation September 1, 1939*

This cause coming on to be heard upon the motion of F. A. Webb to strike from the citation heretofore issued herein the name "Borden-Wieland, Inc.," and the Government being represented in open Court by its counsel, and the Court being fully advised,

It is hereby ordered that the name "Borden-Wieland, Inc." be stricken from the citation heretofore filed herein.

Dated at Chicago, Illinois, September 1, 1939.

Enter:

(Signed) CHARLES E. WOODWARD.

275 In United States District Court

[Title omitted.]

*Order to file bill of exceptions*

This cause coming on to be heard upon the motion of certain defendants to settle a Bill of Exceptions of proceedings held before Judge Charles E. Woodward on August 28, 1939, and the attorneys for the United States of America having been notified of such motion and being present in open Court; and the said Bill of Exceptions having been duly signed and certified by the Judge of this Court:

It is ordered that said Bill of Exceptions be filed of record in this cause.

Enter:

CHARLES E. WOODWARD, Judge.

Dated September 1, 1939.

## In United States District Court

[Title omitted.]

*Bill of exceptions*

Filed Sept. 1, 1939

MOTION TO AMEND ORDER OF AUGUST 17, 1939, ALLOWING APPEAL TO THE  
UNITED STATES OF AMERICA

Stenographic transcript of proceedings had in the above-entitled cause before the Honorable Charles E. Woodward, one of the Judges of said Court, on the 28th day of August, A. D. 1939, at the hour of ten o'clock A. M.

Present: Mr. Britt, Mr. Daly, Mr. Burnham, Mr. McPherson, Mr. Martin, Mr. Hart, Jr., Mr. Rathbun, Mr. Freed, Mr. Schaffer, Mr. Burns, Mr. Dillie, Mr. Graves, Mr. Thayer.

278 The CLERK. United States versus Borden et al. Motion to amend Order of August 17, 1939, allowing appeal to the United States of America.

Mr. BURNHAM. If your Honor please, on August 17th you granted an appeal, entering an order ex parte in this case, and this is a motion to amend that order by striking certain words therefrom.

The petition for appeal prayed for an appeal from the order sustaining certain demurrers and motions to quash, but the order entered by your Honor allows an appeal from an order sustaining demurrers, motions to quash, and special pleas in bar.

There are no special pleas in bar; and for that reason we are asking that the order be amended by striking—

The COURT. That affects only your one client; doesn't it?

Mr. BURNHAM. No, your Honor. It affects all. The situation is this, the civil—the criminal—

The COURT. I understand the Government contends that in effect the motion as to one of those defendants is a plea in bar.

Mr. BURNHAM. No.

Mr. BRITT. Yes, your Honor; that is the contention of  
279 the Government.

Mr. BURNHAM. The contention of the Government, as I understand it—

Mr. BRITT. I will state that, if you don't mind.

Mr. BURNHAM. Well, all right, do state it.

Mr. BRITT. The contention of the Government is that the motions and demurrers to quash are pleas, they are pleadings, and they are designated by the defendants as motions to quash and demurrers; but the effect of that is to bar a prosecution under the Sherman Act. That is, the order of the court states that by reason of the enactment of the Agricultural Adjustment Act that no indictment will lie under the Sherman Act.

Now, strictly speaking, that is not a construction of the Act upon which the indictment is founded, but rather a statement of the

application of it, and the Government is interested in it for this reason, that the Criminal Appeals Act has two paragraphs under which we may go to the Supreme Court of the United States. One is that there may be a direct appeal from the decision or judgment concerning the validity or construction of the statute upon which the indictment is founded. Now, there is a limitation in that  
 280 Section by which we do not care to be bound when the effect of the ruling is also to sustain a special plea in bar, which is taken care of under Section 682 of Title 18, and the Supreme Court has stated as recently as 1931, in *United States v. Murdock*, where Justice Butler said:

"If the effect of the judgment upon the plea for the defendant is to bar further prosecution for the offense charged, it is a 'special plea in bar' within the meaning of Title 18, U. S. C. A., Section 682, and it follows unquestionably that without regard to the particular designation or form of the plea or its propriety, the Supreme Court has jurisdiction under the Criminal Appeals Act."

Now, the fact that the defendant has called this a demurrer or special plea in bar or a motion to quash, if the effect of it is to sustain a special plea in bar, then the substance and not the form of the motion is what applies.

The COURT. There is only one special plea in bar here, that I remember at least.

Mr. BURNHAM. As a matter of fact, your Honor, there is none.

The COURT. That related to your client in Delaware.

281 Mr. BURNHAM. Borden-Wieland Company

The COURT. Borden-Wieland.

Mr. BURNHAM. The position just stated by Mr. Britt is exactly the way I understood the Government's position to be. They are contending that motions to quash and demurrers are in effect pleas in bar. That is what they are contending. Now, they may make—

The COURT. Really, Mr. Burnham, this court cannot settle that.

Mr. BURNHAM. No, your Honor; but you did. You say by the Order, because you stated in the order that you allowed an appeal from your order sustaining certain motions to quash, demurrers, and special pleas in bar. When they petitioned for the appeal they did not say they had any special pleas in bar from which they wished to appeal. They merely said they had certain motions to quash and demurrers from which they sought an appeal; but when they handed to you the order to sign, *ex parte*, they included in it an allowance of an appeal from motions to quash, demurrers, and special pleas in bar.

Now, the special pleas in bar which they claim are involved; the so-called special pleas in bar, are nothing more than demurrers and motions to quash.

282 The COURT. Well, that gets back to exactly what I was thinking about. You can make a motion then in the Supreme Court to dismiss their appeal, and argue it, whether the Supreme Court has—

Mr. BRITT. I think that is the proper—

The COURT (continuing). Jurisdiction to decide it.

Mr. BRITT (continuing). Place for it, your Honor, because the Rules so provide. They do not provide for any motion being made at this time. They specifically set forth the procedure; that is, for the defendants, if they are going to make anything against the jurisdiction of the court, to file a typewritten statement setting forth any matter or ground upon which they make their claim against the jurisdiction by the Supreme Court.

The COURT. I presume that order would be necessary to bring up the Borden-Wieland pleading.

Mr. BURNHAM. No, your Honor. This has nothing to do with Borden-Wieland at all, although I have another motion that I want to make with reference to Borden-Wieland, but this has only to do with all the defendants in the case except Borden-Wieland. This has to do with the situation where your Honor is now, by the effect of your order, stating that you ruled on the special pleas in bar, when as a matter of fact you only ruled on motions to quash and demurrers.

283 Now, Mr. Britt says—

The COURT. The record will show exactly what the ruling was.

Mr. BURNHAM. That is true, your Honor, but what you are doing here now by your order is practically certifying to the Supreme Court that you did in fact rule on the pleas in bar. We do not wish to enter the Supreme Court—

The COURT. There is nothing for the order to attach to, so can't you argue that in the Supreme Court?

Mr. BURNHAM. No, your Honor; because in effect you could, if you wished, in some way certify that there were pleas in bar involved. We do not want to have any such matter as that.

The COURT. Well, the Supreme Court might not agree with me.

Mr. BURNHAM. I know it might not; but they want to enter the Supreme Court with that advantage, to wit, that you have already passed upon the point, and held these demurrers to be, in effect, pleas in bar. We do not think that you should do that, and let them enter the Supreme Court with that advantage over the defendants.

284 You did not rule on anything but demurrers and motions to quash.

Let me explain again what the situation is, and why they seek this.

The Criminal Appeals Act has two sections to it:

"(1) Permitting direct appeal in cases where the construction and validity of the basic statute is involved;

"(2) Regardless of construction and validity in cases where special pleas in bar have been ruled against the Government."

So they fear now that the construction and validity of the basic statute is not involved, and therefore, in order to get a second string to their bow, they attempt to make this a ruling by your Honor on a



special plea in bar, because, if it is a ruling on a special plea in bar, then construction and validity is not involved. So they appeal, as their petition itself says, on two grounds: (1) That the construction and validity of the basic statute is involved, and (2) That even if it is not a special plea in bar, has been ruled against them, and that therefore under Section 2 of the Criminal Appeals Act they are entitled to an appeal.

285 Now, whether they are right or not is beside the point. We thing that your Honor is not the one to pass upon that question, and that you have done so by granting them an appeal from a ruling made by you on a special plea in bar, when, as a matter of fact, the only ruling that you made was a ruling upon a demurrer and motion to quash; and all we ask is that you delete from the order that part of it which refers to special pleas in bar. For instance, the petition says, your Honor, that the Government "prays that it may be allowed to appeal to the Supreme Court for a reversal of such judgment and order insofar as it sustains the demurrers and motions to quash." That was the petition.

Now, then, the order says, "It is ordered that the United States of America be, and it is hereby, allowed an appeal from the order and judgment of this court sustaining the demurrers and motions of the defendant to quash the indictment and special pleas in bar."

They did not ask for it in the petition; they got it in the order. They have revealed the reason why they want it is to have the question prejudged here as they enter the Supreme Court as to whether or not pleas in bar were involved in your rulings.

286 Mr. BRITT. That's not—

Mr. BURNHAM. They may argue it. They may argue it, but they should not have a ruling by your Honor on the question.

Mr. BRITT. Your Honor, the statement in the order is an interpretation—

The COURT. I cannot see your point. Maybe I am dense this morning.

Mr. BRITT. It is an interpretation of the legal effect—

The COURT. I will have to ask you to excuse me for just a few moments.

(Short delay.)

The COURT. Proceed.

Mr. BURNHAM. If the Court please, the only thing that the defendants are interested in is having an order which comports with the facts. This order which was entered by your Honor states that pleas in bar were filed. No pleas in bar were filed. The order also states that pleas in bar were ruled upon. No pleas in bar were ruled upon.

Now, the importance of the situation comes from the fact that within 15 days from the time of the entry of this order we must, 287 if we so see fit, contest the jurisdiction of the Supreme Court to entertain this appeal.

We are going to contest it on the ground that the validity of the basic statute was not involved in your Honor's ruling on the demur-

ers on July 28th. They are going, of course, to contend that the validity of the statute was involved, but they are going to say, furthermore, even if we are defeated on that point, the Government has a right to appeal on another point, to wit, that the lower court ruled on special pleas in bar. They are then going to point to the record and say, "Look at the order which was entered by Judge Woodward on August 17th. It states that pleas in bar were filed and pleas in bar were ruled upon." The Supreme Court cannot go beyond and behind that record. That is the position that they wish to put us in here now. That is the position which we wish to avoid.

It is true that they may argue, when they get into the Supreme Court, that your ruling was in effect a ruling upon a plea in bar, had the effect of a ruling upon a plea in bar. We do not care whether they argue that, but we do not wish to have the record against us when they argue in the Supreme Court. That  
288 is our position; and all we ask is that those words, "pleas in bar," be stricken from that order.

Mr. BRITT. May it please the Court, I disagree with Mr. Burnham's statement that the Supreme Court cannot go behind the order and say whether or not these were pleas in bar. The order merely states the legal effect of pleadings which were filed by the defendant, regardless of what the defendants call those pleadings; and I do not think that we should be required now to elect whether or not we will appeal on the ground that the construction of the basic statute was involved, or whether we shall appeal also and be able to urge also that we are appealing from a decision which in effect sustains a special plea in bar.

Mr. BURNHAM. We are not asking you to elect.

Mr. BRITT. Well then I think that ought to stand as it is.

The COURT. What is the wording of that original order?

Mr. BURNHAM. The order of August 17th stated:

"This cause having come on to be heard upon demurrers,  
289 motions to quash and special pleas in bar interposed by the defendants, the Court orders that the appeal is hereby allowed from the order and judgment of this court sustaining demurrers and motions of the defendants to quash the indictment and special pleas in bar,"

and what we ask to be eliminated are the words—

The COURT. There was nothing as to special pleas in the order—

Mr. BURNHAM. What is that, your Honor?

The COURT (continuing). Except as to Borden Wieland.

Mr. BURNHAM. That is aside from this entirely. That comes up later. There were no special pleas in the order.

Mr. BRITT. They were not called so, but the effect of them was—when your Honor held that the Agricultural Adjustment Act barred a further prosecution under the indictment, under the Sherman Act, your Honor held that it barred a prosecution.

The COURT. It does occur to me that this is a matter that I cannot settle, that this court cannot settle; and, Mr. Burnham, if your position is correct on your motion to dismiss for want of  
290 jurisdiction, that matter can be urged also the Supreme Court, which has plenary power to decide it.

Mr. BURNHAM. That is true, your Honor, but when I do that they will point to the record and say the record shows that a plea in bar was filed and ruled on.

The COURT. In response to that you will point to the record and say that there are no pleas in bar involved at all. Here is the indictment. Here are the demurrers scattered all through this record, and the legal effect of what I said was you challenge the sufficiency of the indictment as a pleading, and as a matter of law that indictment cannot be sustained.

Now, it is for the Supreme Court to determine whether demurrers are pleas in bar, or rejoinders, or whatever you want to call them. This court cannot finally determine that.

Mr. BURNHAM. Then why, your Honor, should you call these demurrers pleas in bar, and all we want is to have you refrain from calling them pleas in bar.

The COURT. I might misconstrue it.

Mr. BRITT. Well, we wanted to go up on that, that's all.

291 The COURT. I don't think they are pleas in bar, for that matter, as far as I know any pleading, but the Government may disagree with that.

Mr. BURNHAM. But, your Honor, the order says that.

The COURT. The Government ought to have the right to present the matter to the Supreme Court.

Mr. BURNHAM. But your Honor, your Honor said that they filed pleas in bar. Your Honor just said you don't think they are pleas in bar.

The COURT. If the record does not support it, there is nothing for that statement to attach to.

Mr. BURNHAM. What possible objection, your Honor, could there be to striking out from this order the words which do not comport with the facts? That's all I want.

The COURT. The Supreme Court may disagree with me.

Mr. BURNHAM. Well, that would be on argument as to the effect of the demurrers but not on an argument as to the fact as to whether there were special pleas in bar filed, that's all.

The COURT. That is a matter, it seems to me, you will have to argue before the Supreme Court.

292 Mr. SCHAFFER. If the Court please, if this was done—what the Government says what you call a demurrer was in effect a plea in bar—now if they put in there that the documents which we filed, whether they are called demurrers or motions to

quash, or anything else, were treated as pleas in bar, were in effect considered pleas in bar, I think that you obviate that.

The COURT. I think my opinion makes it very definite, as to what I have ruled on.

Mr. BRITT. Yes.

The COURT. Call them that or call them anything else they want to in the order, if the record does not support that finding in the order, that statement in the order, then you can make the same argument in the Supreme Court that you are making here.

I will deny the motion.

Mr. BURNHAM. Your Honor, there is another matter that I think there will be no controversy about.

Borden-Wieland, you will recall, was dismissed out on the ground—

The COURT. Yes.

Mr. BURNHAM (continuing). That there was a plea in abatement filed. Then when they filed petition to appeal they left out  
293 any reference to Borden-Wieland. When they filed the order granting the appeal, they left out any reference to Borden-Wieland. When they filed their assignment of errors they left out any reference to Borden-Wieland; but when the citation was issued it included the name of Borden-Wieland. I think it is agreeable—

Mr. BRITT. I will agree to that. We do not intend to appeal from the order to dismiss service on Borden-Wieland. That may be stricken from the citation, their name. It was just included so they would get notice of all things if they wanted them.

Mr. BURNHAM. They are not in existence.

Mr. BRITT. The citation required them to appear, but we will ask—we will consent that their name be stricken from the citation. Is that satisfactory?

The COURT. Does this court have authority to do that?

Mr. BURNHAM. Yes; your Honor. It is within term.

The COURT. Oh, yes.

Mr. BURNHAM. You issued the citation.

Mr. BRITT. Your Honor issued the citation.

The COURT. I issued the citation; that is right.

Mr. BRITT. There is no question about that.

294 Mr. BURNHAM. I will send that over.

The COURT. Prepare your motion slip or draft of an order.

Mr. BRITT. There is no question about that.

Mr. BURNHAM. And I will file the other motion papers that we have here, just now.

The COURT. All right.

(Which were all the proceedings had in the above entitled cause.)

And forasmuch as the matters above set forth do not fully appear of record, certain defendants tender this their Bill of Exceptions,



and pray that the same may be signed by the Judge of this Court; which is done accordingly, this 1st day of September 1939.

CHARLES E. WOODWARD, *Judge.*

[File endorsement omitted.]

307 [Clerk's certificate to foregoing transcript omitted in printing.]

308 In Supreme Court of the United States

*Statement of points and designation of record to be printed*

Filed October 2, 1939

I

United States of America, Appellant, states that in its brief and oral argument on its appeal in the above-entitled cause it will rely upon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

ROBERT H. JACKSON,  
Robert H. Jackson,  
*Solicitor General.*

PROOF OF SERVICE

Service of the within Statement of Points and Designation of Record to be printed acknowledged September 30, 1939.

Sidley, McPherson, Austin & Burgess (G. A. R. Jr.), Donald F. McPherson, Cecil I. Crouse, Howard Neitzert, Mayer, Meyer, Austrian & Platt, Frederic Burnham, Sidley, McPherson, Austin & Burgess, Esqs., Donald F. McPherson, Esq., Mayer, Meyer, Austrian & Platt, Esqs., Frederic Burnham, Esq., Cecil I. Crouse, Esq., Howard Neitzert, Esq., Attorneys for The Borden Company; Charles L. Dressel, Harry M. Reser, W. A. Baril, H. W. Comfort, S. M. Ross, O. O. Smaha, R. W. Nessler, F. A. Webb, W. A. Wentworth, Defendants.

Montgomery, Hart, Pritchard & Herriott, Louis E. Hart, Irving Herriott, L. Edward Hart, Jr., by W. W. John; Montgomery, Hart, Pritchard & Herriott, Esqs., Louis E. Hart, Esq., Irving Herriott, Esq., L. Edward Hart, Jr., Esq., Attorneys for Bowman Dairy Company; D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Defendants.

Deneen and Massena, Charles S. Deneen, Donald N. Schaffer; Deneen & Massena, Esqs., Charles S. Deneen, Esq., Donald N. Schaffer, Esq., Attorneys for Hunding Dairy Company, Carl W. Hunding, Defendants.

Isidore Fried; Isidore Fried, Esq., Attorney for Capitol Dairy Company, Hyman Freed, Defendants.

Gann, Secord, Stead, & McIntosh; Bernhardt Frank, Secy., Gann, Secord, Stead & McIntosh, Esqs.; Bernhardt Frank, Esq., Attorneys for Sidney Wanzer & Sons, Inc., International Dairy Company, Milk Dealers Bottle Exchange, Gordon B. Wanzer, H. Stanley Wanzer, Louis Janata, Defendants.

Fred C. Nonnamaker, Jr., B. F.; Fred C. Nonnamaker, Jr., Esq., Attorney for Associated Milk Dealers, Inc., Paul Potter, Otto Black, Defendants.

Schuyler & Hennessy, George W. Lennon, W. C. Graves, Martin Burns, J. M.; Schuyler & Hennessy, Esqs., George W. Lennon, Esq., W. C. Graves, Esq., Martin Burns, Esq., Attorneys for Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, John P. Case, Defendants.

Isham, Lincoln & Beale, Ben H. Matthews, James P. Dillie (g. v.); Isham, Lincoln & Beale, Esqs., Ben H. Matthews, Esq., James P. Dillie, Esq., Attorneys for Leland Spencer, Defendant.

Edward H. Murnane, Esq., James A. Harrington, Esq., per A. L., Edward H. Murnane, Esq., James A. Harrington, Esq., Attorneys for: Western-United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, Defendants.

Frank J. Gillespie, Joseph A. Padway, David A. Riskind, per D. B., David A. Riskind, Esq., Joseph A. Padway, Esq., Frank J. Gillespie, Esq., Attorneys for: Milk Wagon Drivers' Union, Local 753, Robert G. Fitchie, James Kennedy, Steve Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, David A. Riskind, Defendants.

Kirkland, Fleming, Green, Martin & Ellis, Weymouth  
Kirkland, Jay Fred Reeve, Daniel D. Carmell (by  
Kirkland, Fleming, Green, Martin & Ellis), A. Lowry;  
Kirkland, Fleming, Green, Martin & Ellis, Esq.,  
Weymouth Kirkland, Esq., Jay Fred Reeve, Esq.,  
Daniel D. Carmell, Esq., Attorneys for: Leslie G.  
Goudie, Defendant.

Thomas Dodd Healy, M. M., Thomas Dodd Healy, Esq.,  
Attorney for: Daniel A. Gilbert, Defendant.

Charles F. Rathbun, Charles F. Rathbun, Esq., Attorney  
for: Herman N. Bundesen, Paul Krueger, William J.  
Guerin, Defendants.

[File endorsement omitted.]

[Endorsement on cover:] File No. 49804. N. Illinois, D. C. U. S.  
Term No. 397. The United States of America, Appellant, vs. The  
Borden Company, Charles L. Dressel, Harry M. Reser, et al. Filed  
September 18, 1939. Term No. 397, O. T. 1939.







NAME		DATE	AMOUNT	CHECK NO.	REMARKS
1	W. J. BROWN	10/10/41	10.00	1001	W. J. BROWN
2	W. J. BROWN	10/10/41	10.00	1002	W. J. BROWN
3	W. J. BROWN	10/10/41	10.00	1003	W. J. BROWN
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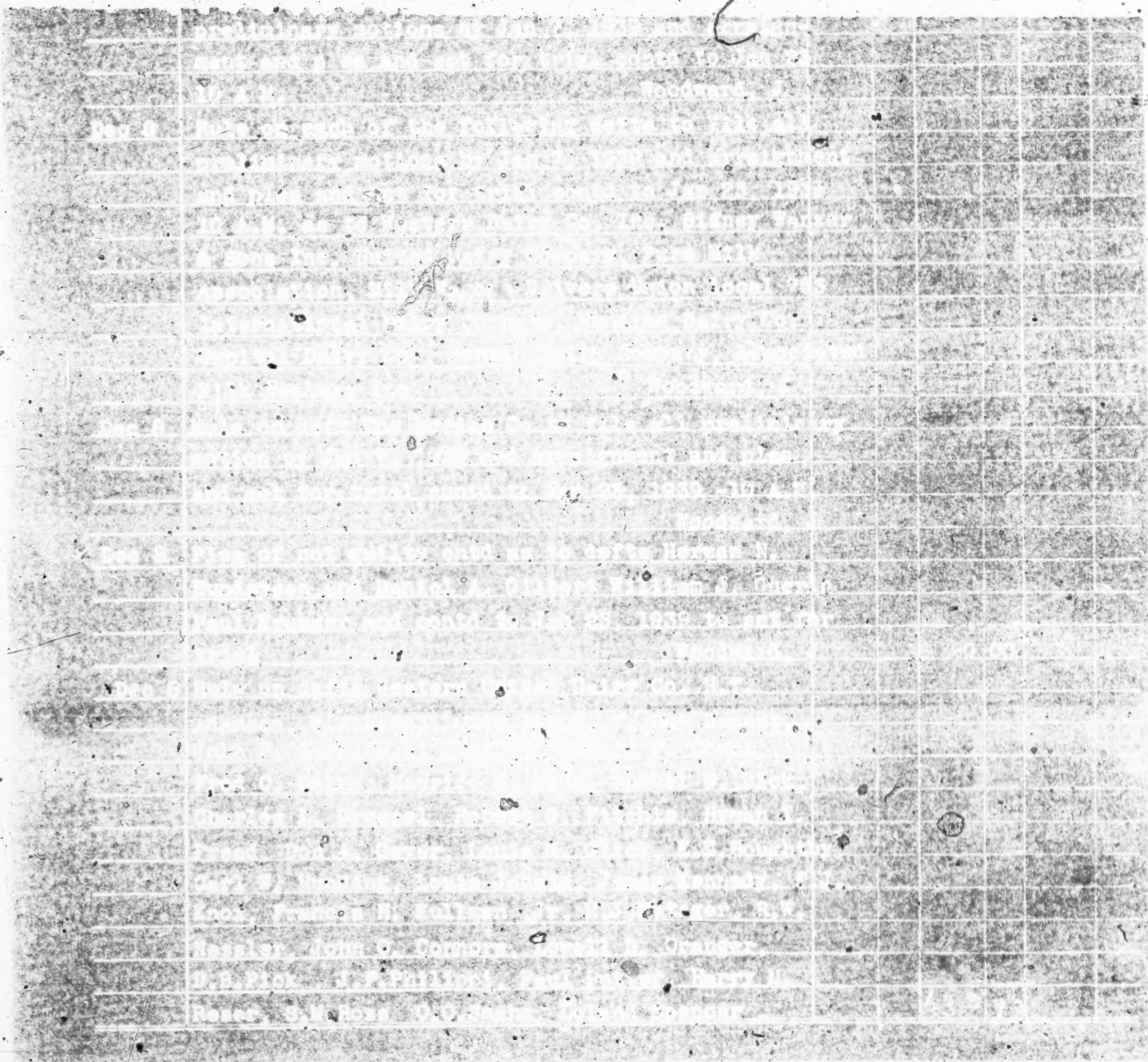


DATE	FILINGS - PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURN
		PLAINTIFF	DEFENDANT	
36			51.00	
	Louis E. Hart		51.00	
Nov 16	Issued (4) copies of Indictment to Albert G. Krane Atty		54.80	
Nov 16	Issued (6) indictments to Byn McIntire		92.00	
Nov 17	Issued copy of Indictment to Kirkland, Fleming Green, Martin & Ellis and Daniel D. Carmell		16.20	
Nov 22	Issued copy of Indictment to Fred C. Nonnamaker Jr		16.20	
Nov 23	Issued (2) copies of Indictment to Isidore Freed Atty		32.40	
Dec 1	Filed Appearance of Paul Potter and Otto Blank - Fred C. Nonnamaker, Jr Atty			
Dec 1	Issued (2) certified copies to Fred C. Nonnamaker Jr. Atty		24.00	
Dec 3	Filed Appearance -The Borden Co, Charles L. Dressel, Harry M. Riser, W.A. Baril, R.W. Confort S.M. Ross, O.C. Smaha, R.W. Nessler, F.A. Webb, Leland Spencer and W.A. Wentworth by Frederic Burnham, Donald F. McPherson and Cecil E. Crouse			
Dec 6	Filed Appearance, Leland Spencer by Isham Lincoln and Beale Attys			
Dec 6	Issued certified copy of Indictment to Isham Lincoln & Beale Attys		10.00	
Dec 6	Filed Appearance -Pure Milk Association, Don M. Geyer, Edward P. Cooke, E.E. Houghtby, F.J. Knox Lowell D. Oranger and John P. Case by Schuyler & Hennessey, George W. Lannon, W.C. Graves and Martin Burns Attys			
Dec 6	Filed Appearance -Western United Dairy Company			

	Fred C. Nonnamaker, Jr Atty	
Dec 1	Issued (2) certified copies to Fred C. Nonnamaker Jr, Atty	24 50
Dec 3	Filed Appearance -The Borden Co, Charles L. Dressel, Harry M. Riser, W.A. Baril, H.W. Confort S.M. Ross, O.C. Smaha, R.W. Neesler, F.A. Webb, Leland Spencer and W.A. Wentworth by Frederic Burnham, Donald F. McPherson and Cecil T. Crouse	
Dec 6	Filed Appearance, Leland Spencer by Isham Lincoln and Beale Attys	
Dec 6	Issued certified copy of Indictment to Isham Lincoln & Beale Attys	2 10
Dec 6	Filed Appearance -Pure Milk Association, Don M. Geyer, Edward P. Cooke, E.E. Houghtby, F.J. Knox Lowell D. Oranger and John P. Case by Schuyler & Hennessy, George W. Lannon, W.C. Graves and Martin Burns Attys	
Dec 6	Filed Appearance -Western -United Dairy Company a Corp Western Dairy Co, Inc. a Corp United Dairy Company a Corp Maurice S. Dick, Louis S. Clark Samuel S. Dick by Edward H. Murnane and James A. Harrington Attys	
Dec 7	Issued certified Copy of Indictment to Harrington & Murnane Attys	35 40
Dec 8	Filed Appearance, Bowman Dairy Company, a Corp D.B. Peck, Francis H. Kullman, Jr, R.J. Mettger H.T. Adamson and J.F. Philippi -Louis E. Hart, Irving Harriott and L. Edward Hart Jr. Attys	41 10



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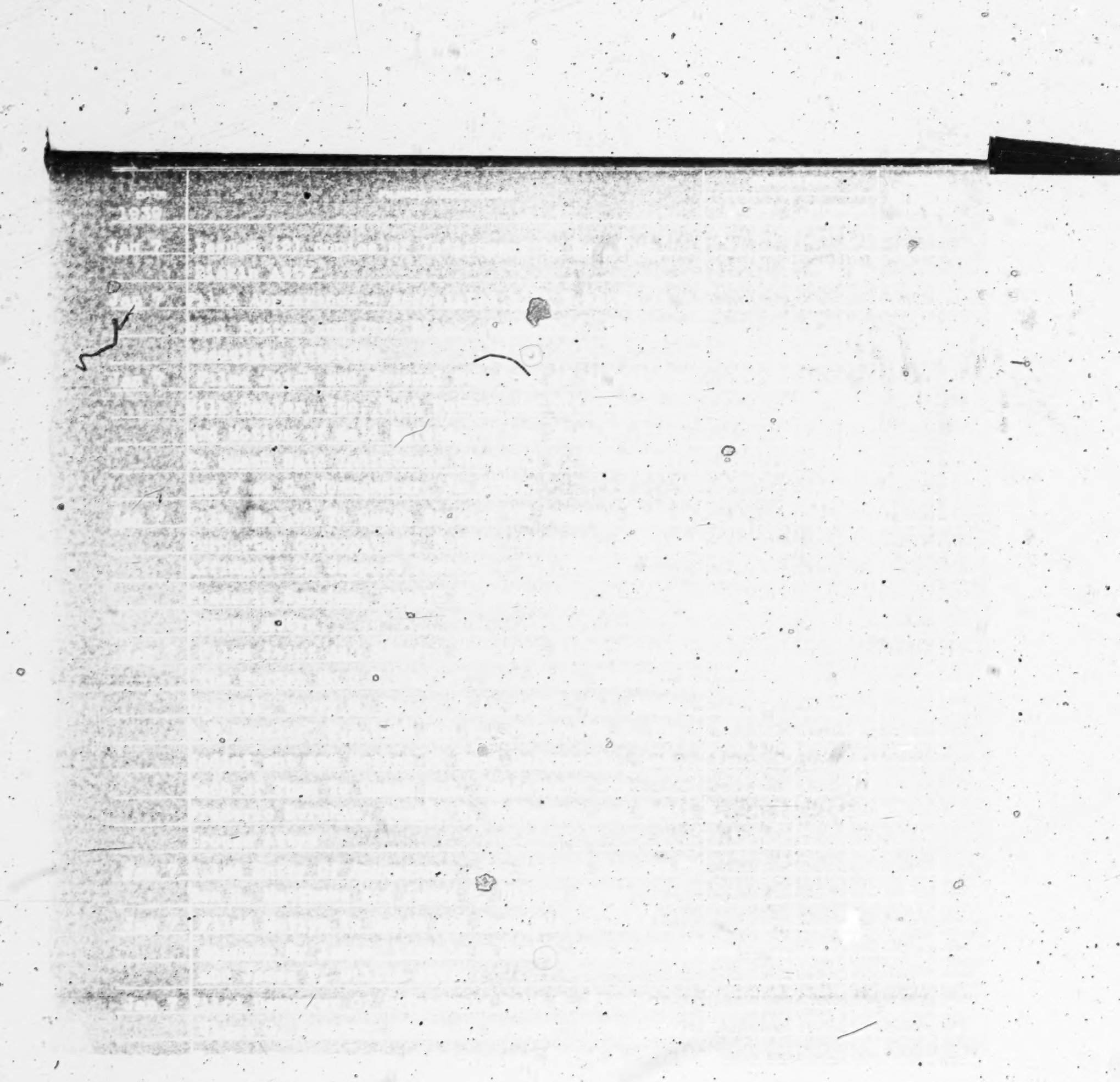




DATE	FILINGS - PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
1938			637.90	
	Steve Sumner Gorden B. Wanzer, H. Stanley Wanzer F.A. Webb and W.A. Wentworth to file with the Clerk of the Court all preliminary motions in above cause on or before Jan 7, 1939 and for arraignment and plea and to set for trial as to each deft, contd to Jan 23, 1939-10 A.M. and leave given defts Leslie Goudie and Dan Gilbert to withdraw pleas of not guilty and file all preliminary motions by Jan 7 and contd to Jan 23 for plea and to set for trial and leave given Borden Weiland Inc. to file motion to quash service Woodward, J			
Dec 9	Summons ret'd executed (Milk Wagon Drivers Union Local 753 )			
Dec 9	Summons ret'd executed -Pure Milk Association			
Dec 9	Summons ret'd executed Borden -Weiland Inc			
Dec 9	Summons ret'd executed -Capitol Dairy Co.			
Dec 9	Summons ret'd executed -Sidney Wanzer & Sons, Inc			
Dec 9	Summons ret'd executed -Hunding Dairy Co			
Dec 9	Summons ret'd executed -Western United Dairy Co			
Dec 9	Summons ret'd executed -United Dairy Company			
Dec 9	Summons ret'd executed - Western Dairy Co, Inc			
Dec 9	Summons ret'd executed @ Bowmar Dairy Company			
Dec 9	Summons ret'd executed -Milk Dealers Bottle Exchange			
Dec 9	Summons ret'd executed -International Dairy Company			
Dec 9	Summons ret'd executed -Associated Milk Dealer's Inc			
Dec 9	Summons ret'd executed -The Borden Company			
Dec 12	Filed Appearance of Daniel A. Gilbert by Thomas Dodd Healy Atty			
Dec 12	Issued copy of Indictment to Thomas D Healy Atty		8.30	
Dec 23	Filed Notice - Burnham, Hart & McInish Attys		647.00	
Dec 23	Order that said orders of Dec 8, 1938 be and the			
	summons be satisfied to require all defts			

	of not guilty and file all preliminary motions by Jan 7 and contd to Jan 23 for plea and to set for trial and leave given Borden Weiland Inc. to file motion to quash service Woodward, J				
Dec 9	Summons ret'd executed (Milk Wagon Drivers Union Local 753 )				
Dec 9	Summons ret'd executed -PureMilk Association				
Dec 9	Summons ret'd executed Borden -Weiland Inc				
Dec 9	Summons ret'd executed -Capitol Dairy Co.				
Dec 9	Summons ret'd executed -Sidney Wanzer & Sons, Inc				
Dec 9	Summons ret'd executed -Hunding Dairy Co				
Dec 9	Summons ret'd executed -Western United Dairy Co				
Dec 9	Summons ret'd executed -United Dairy Company				
Dec 9	Summons ret'd executed - Western Dairy Co, Inc				
Dec 9	Summons ret'd executed @ Bowman Dairy Company				
Dec 9	Summons ret'd executed -Milk Dealers Bottle Exchange				
Dec 9	Summons ret'd executed -International Dairy Company				
Dec 9	Summons ret'd executed -Associated Milk Dealer's Inc				
Dec 9	Summons ret'd executed -The Borden Company				
Dec 12	Filed Appearance of Daniel A. Gilbert by Thomas Dodd Healy Atty				
Dec 12	Issued copy of Indictment to Thomas D Healy Atty			B 20	
Dec 23	Filed Notice - Burham, Hart & McInish Attys			64700	
Dec 23	Order that said orders of Dec 8, 1938 be and the same are hereby modified to require all defts who desire to file motions, demurrers or pleas in abatement herein to file a motion, demurrer or such a plea with the Clerk of this Court by Jan 7, 1939 (draft) Woodward, J				
Jan 6	Filed Demurrer of Deft Daniel A. Gilbert - Thos Dodd Healy Atty				











DATE 1939	FILINGS-PROCEEDINGS	CLERK'S FEES			AMOUNT REPORTED IN ENROLLMENT STATEMENTS
		PLAINT	RESPONSE	OTHER	
	and Carl W. Hunding To Quash Indictment And Demurrer Of Said Defendants -Deneen and Massena Attys				
Jan 7	Filed Notice & Demurrer Of Defendants Bowman Dairy Co., D.C. Peck, Francis H. Kullman, Jr., M.J. Metzger, H.T. Adanson and J.F. Philippi by Louis E. Hart, Irving Herriott and L. Edward Hart, Jr., Attorneys				
Jan 7	Filed (6) Demurrers, United Dairy Company, a Corp Maurice S. Dick, Samuel S. Dick, Western United Dairy Co., a Corp. Western Dairy Company, Inc. a Corp. and Louis G. Glick by James A. Harrington and Edward H. Murnane Attys				
Jan 7	Filed Demurrer and Motion To Quash Indictment -Leslie G. Goudie By Weymouth Kirkland and Jay Fred Reeve Attys				
Jan 7	Filed Motion For Bill of Particulars - Weymouth Kirkland and Jay Fred Reeve Attys				
Jan 7	Filed (6) Demurrers to Indictment -Louis Janata Milk Dealer's Bottle Exchange, a Corporation, International Dairy Company, a Corp. Sidney Wanzer & Sons, Inc. a corp. Gordon B. Wanzer and Stanley H. Wanzer -Loy N. McIntosh, David R. Gann, Frederick Secord and J. Walter Stead, Attys				
Jan 7	Filed Motion To Quash and Demurrer for Pure Milk Association, Don M. Geyer, Edward F. Cooke, E.H. Houghtby, F.J. Knox, Lowell D. Oranger and John F. Case By George W. Lennon, W.C. Graves, Schuyler and Hannassy, and Martin Burns Attys				
Jan 7	Filed Memorandum of Authorities and Suggestions In Support of Motion To Quash and Demurrer In				



Attorneys

Jan 7	Filed (6) Demurrers, United Dairy Company, a Corp Maurice S. Dick, Samuel S. Dick, Western United Dairy Co., a Corp. Western Dairy Company, Inc. a Corp. and Louis G. Glick by James A. Harrington and Edward H. Murnane Attys
Jan 7	Filed Demurrer and Motion To Quash Indictment -Leslie G. Goudie By Weymouth Kirkland and Jay Fred Reeve Attys
Jan 7	Filed Motion For Bill of Particulars - Weymouth Kirkland and Jay Fred Reeve Attys
Jan 7	Filed (6) Demurrers to Indictment -Louis Janata Milk Dealer's Bottle Exchange, a Corporation, International Dairy Company, a Corp. Sidney Wanzer & Sons, Inc. a corp. Gordon B. Wanzer and Stanley H. Wanzer -Loy M. McIntoch, David R. Gann, Frederick Secord and J. Walter Stead, Attys
Jan 7	Filed Motion To Quash and Demurrer for Pure Milk Association, Don M. Geyer, Edward F. Cooke, E.E. Houghtby, F.J.Knox, Lowell D. Oranger and John P. Case By George W. Lennon, W.C.Graves, Schuyler and Hennessey, and Martin Burns Attys
Jan 7	Filed Memorandum of Authorities and Suggestions In Support pf Motion To Quash and Demurrer In Behalf Of Defts, Pure Milk Association, Don M.Geyer Edward F. Cook E.E.Houghtby, F.J.Knox, Lowell D. Oranger and John P. Case By George W. Lennon W.C.Graves, Schuyler & Hennessey and Martin Burns their attys
Jan 10	Filed Notice (2) Joseph A. Padway and David A. Riskind Attys

DATE 1939	FILINGS-PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
Jan 10	Filed Praecipe -Leo F. Tierney, certified orders issued	1 60		
Jan 10	Filed Notice -Isidore Fried Atty for Capitol Dairy Co and Hyman I. Freed			
Jan 10	Filed Memorandum In Support of Demurrers- Gann Secord, Stead & McIntosh Attys for Loy N. McIntosh and Bernard Fernhardt Frank of Counsel			
Jan 10	Filed Notice-Frederic Burnham,Donald F. McPherson and Cecil I. Crouse Attys	X		
Jan 17	Filed (2) Notices-U.S.Att'y & Leo F. Tierney Spl Ass't to Atty Gen'l			
Jan 17	Ordered that plea and arraignment of the defts in above cause contd from Jan 23, to Feb 23, 1939 (draft) Ordered that time of Gov't in which to answer, reply, demur or otherwise plead with respect to the several pleas, demurrers and motions heretofore filed herein by the defts and also the time of the Gov't in which to file its reply briefs, memoranda and points of authorities heretofore filed herein by the defts is extended to and including Feb 23, 1939 Woodward, J			
Feb 10	Filed Praecipe - Thurman Arnold Ass't Atty General certified copies issued			3 20
Feb 20	Filed Notice - Werner W. Schroeder and Donald Kane and Charles W. Wilson Attys for National Cooperative Milk Producers'			
Feb 20	Filed Petition of National Cooperative Milk Producers' by Schroeder, Kane and Wilson Attys			
Feb 20	Petition of National Cooperative Milk Producers' Federation to Intervene and file Brief Amicus Curiae set for hrg March 17, 1939 -2 P.M. Woodward, J			



Jan 10	Filed Notice-Frederic Burnham, Donald F. McPherson and Cecil I. Crouse Attys	X	
Jan 17	Filed (2) Notices-U.S. Atty & Leo F. Tierney Spl Ass't to Atty Gen'l		
Jan 17	Ordered that plea and arraignment of the defts in above cause contd from Jan 23, to Feb 23, 1939 (draft) Ordered that time of Gov't in which to answer, reply, demur or otherwise plead with respect to the several pleas, demurrers and motions heretofore filed herein by the defts and also the time of the Gov't in which to file its reply briefs, memoranda and points of authorities heretofore filed herein by the defts is extended to and including Feb 23, 1939 Woodward, J		
Feb 10	Filed Praecipe - Thurman Arnold Ass't Atty General certified copies issued		3 20
Feb 20	Filed Notice - Werner W. Schroeder and Donald Kane and Charles W. Wilson Attys for National Cooperative Milk Producers'		
Feb 20	Filed Petition of National Cooperative Milk Producers' by Schroeder, Kane and Wilson Attys		
Feb 20	Petition of National Cooperative Milk Producers' Federation to Intervene and file Brief Amicus Curiae set for hrg March 17, 1939 -2 P.M. Woodward, J		
Feb 23	Lv granted defts to file reply brief on or before April 3, plea and arraignment all defts contd to April 14, 1939-all contested motions set for April 13, -10 A.M. Woodward, J		
Mar 9	Filed Notice - Burnham, McPherson and Crouse Attys for the Borden Company		37 20

DATE 1939	FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT PAID IN ADVANCE	
		PLAINT	DEMAND	DEMAND	DEMAND
Mar 9	By agreement of counsel motion entitled and contd to March 10, 1939- 10 A.M. Woodward, J.	37 20			
Mar 9	Filed Petition - Burnham, McPherson and Crouse Attys for the Borden Company				
Mar 10	By granted Borden Company to withdraw from the custody of the Clerk of the District Court, Northern District of Illinois, Eastern Division the corporate minute books of The Borden Company containing minutes of the meetings of the stock holders and the board of directors of the Borden Company held during the period beginning Jan 1st 1938 and ending Sept 18, 1938, the said The Borden Company to have control and custody of said minute books for eleven days beginning April 14 1939 and ending April 24, 1939 (draft) Woodward, J.				
Mar 17	Arguts hrd and petition of National Co-Operative Milk Producers Federation to intervene and file Brief Amicus Curia, denied Woodward, J.				
Mar 24	Filed Reply Brief of Defendants in Support of Their Motion For Bill of Particulars - Joseph A. Padway Atty				
Mar 24	Filed Brief of Defendants In Reply to Government's Brief In Opposition to Defendant's Demurrer Joseph A. Padway Atty				
Mar 31	Filed Notice - Schuyler & Hennessy (Geo W. Leeman Martin Burns				
Mar 31	Order extdg time to April 8, 1939 for drafts Pure Milk Association. Don H. Geyer, Edward P. Cooke, E.E. Moughtby, F.J. Knox, Lowell S. Oranger and John P. Case to file their Brief or Memorandum of Authorities in reply to brief of the U.S.	37 20			



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A Corporation, et al - James A. Harrington and  
H. Murnann Atty

Apr 10 Order that date for argument be set for  
for April 13 and 14 be set at 10 A.M. and 2  
1939

June 7 Mo for leave to withdraw plea of not guilty as  
to David A. Riskind allowed and plea of not guilty  
withdrawn and lv granted to file a demurrer  
demurrer heretofore filed Woodward

June 7 Arguments hrd in part and contd to June 8, 1939  
10 A.M. for further arguts on demurrers and to  
to quash Woodward

June 8 Arguments hrd and the several motions and de-  
murrers taken under advisement Woodward

July 11 Filed Opinion on demurrers and motions

July 11. Order rule on motion to quash and demurrers  
set for July 13th, 1939. 10-A.M.

July 13. Filed Opinion.

July 13. Order by the Court; Opinion filed. Draft orders  
to be submitted. Woodward

July 29 Filed Notice - Chas F. Nathan Atty for Defts  
Bundesen, P. Krueger and Wm J. Guerin

July 29 Filed Motion and Demurrers Defts Bundesen

July 30 Krueger and Guerin by Chas F. Nathan Atty

Order that lv be granted defts Henry A. Bundesen, P.  
Krueger and Wm J. Guerin to withdraw their  
several pleas of not guilty and said defts  
lv to file instant their joint and several  
demurrers (several) Woodward

July 28 Order that the service of process upon Bundesen  
Inc be quashed and set aside and that the issue



	to David A. Riskind allowed and plea of not guilty withdrawn and lv granted to file a demurrer - demurrer heretofore filed Woodward, J
June 7	Arguments hrd in part and contd to June 8, 1939 10 A.M. for further argnts on demurrers and do to quash Woodward, J
June 8	Arguments hrd and the several motions and demurrers taken under advisement Woodward, J
July 11	<del>Filed Opinion</del>
July 11.	Order rule on motion to quash and demurrers set for July 13th, 1939., 10-A.M
July 13.	Filed Opinion.
July 13.	Order by the Court; Opinion filed. Draft orders to be submitted. Woodward, J
July 29	Filed Notice - Chas F. Rathbun Atty for defts Bundesen, P. Krueger and Wm J. Guerin
July 29	Filed Motion and Demurrers-Defts Bundesen, Krueger and Guerin by Chas F. Rathbun Atty
July 29	Order that lv be granted defts Henry N. Bundesen, Paul Krueger and Wm J. Guerin to withdraw their several pleas of not guilty and said defts given lv to file instanter their joint and several demurrers (draft) Woodward, J
July 28	Order that the service of process upon Borden Holland Inc be quashed and set aside and that the indictment be and the same is hereby dismissed as to all the defts and exceptions allowed to all aggrieved parties (draft) Woodward, J
AUG 17	Filed Citation - Judge Woodward
AUG 17	Filed Statement of Jurisdiction, Opinion and Order
AUG 17	Order that United States of America be and it

PAGE	CASES - PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
1	As early allowed an appeal from the order			
2	and incident of this Court (about)			
3	Under order, Petition and Assignment of Errors			
4	of the State The Attorney General by Leo F.			
5	Wright, Esq., and			
6	Wright, Esq., for Transcript of Record.			
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